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# A Study of the Constitutional Role of the Thai Ombudsman

A thesis submitted for the degree of Doctor of Philosophy

School of Law  
2015

# A Study of the Constitutional Role of the Thai Ombudsman

By

Jiraporn Sudhankitra

A thesis submitted for the degree of Doctor of Philosophy

University of Sheffield  
School of Law  
April 2015

## **Abstract**

The Thai Ombudsman was initially established to handle complaints of grievances from individuals in dealing with government bodies. Subsequently, the Ombudsman was empowered with additional mandates and powers. To understand the viability of this new arrangement, this thesis examines the legislative framework of the Thai Ombudsman using existing well-accepted standards in ombudsman design and explores the actual practice of the Thai Ombudsman. The empirical findings of this thesis indicate that despite some weaknesses and shortcomings, the Thai Ombudsman has served well its main constitutional objectives in redressing administrative grievances and improving administration. Most of its institutional features meet standard practice. However, the thesis argues that some of the new functions do not fit easily into the jurisdiction of the Office because they call for different expertise and resources, attributes that the Ombudsman is not suitably designed for or does not sufficiently possess. Further, the new functions require the Ombudsman to operate in a manner which risks compromising its core values. Thus, rather than strengthening the position of the office, the additional functions weaken the institution, damaging its effectiveness and credibility. This thesis illustrates these points by testing the Thai Ombudsman's experience within an analytical framework based upon theorising on the ombudsman institution and the leading guidelines on the ombudsman available in the professional and academic literature. Ultimately, the thesis argues for the reform of the Thai Ombudsman scheme, including recommending the removal of unsuitable functions. The thesis also identifies weaknesses in the operation and legislative framework of the Thai Ombudsman Office which should be addressed by policy makers, so that it can provide the maximum benefit to the system of government administration and to the individual citizens. Finally, the thesis uses the findings with regard to the Thai Ombudsman to construct a theoretical template of the factors that should be used to determine whether or not an ombudsman scheme should be used to deliver additional functions beyond those of the core ombudsman model.

## Acknowledgements

First and foremost, I would like to thank my supervisors, Dr. Richard Kirkham and Professor Tamara Hervey for their constant support, guidance, invaluable advice, feedback and supervision throughout the work. I would like to express my gratitude to them for keeping me focused, maintaining my confidence and for being great mentors. I would also like to extend my thanks to Dr. Gwen Robinson, Sarah Beedham, Julie Prescott, Ian Loasby, Mykel Spence, Gareth Braid and all the support staff of the School of Law, for their assistance.

I would like to express my profound gratitude to Sukhothai Thammathirat University for the research opportunity, and for funding the research. My deepest gratitude goes to Professor Lawan Hornopparat, former Dean, School of Law.

In addition, I would like to thank people who gave up their time to be interviewed for this thesis. They are: Thai Chief Ombudsman Panit Nitithanprapas, Ombudsman Professor Sriracha Charoenpanich, Dr. Issarabhath Teerabhathsiri, Director, the Thai Ombudsman Office; Wasan Thepmanee, Public Relations Officer, The Thai Ombudsman Office, President of the Senate Surachai Liengboonlertchai, Professor Soonton Maneesawat, Professor Banjerd Singkaneti and Inspector-General/Deputy Permanent Secretary to Office of the Prime Minister Kamol Suksomboon.

I would never have been able to complete this thesis without the help, contribution and motivation from my colleagues, in particular Ali Amal, Alex Bohm, Anna Hescott, Anthony Ellis, Carlos Conde, Chanda Tembo, Edward Van Ash, Kate Wilkinson, James Heydon, Kiers Irwin Rogers, Luke Blindell, Lindsey Rice, Thomas Neel, Simisola Akintoye, Stephen Lea, Robin Morris and Syahliza Warnoh.

Finally, I would like to express my heartfelt gratitude to my family for giving me unfailing love, encouragement and support.

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# Chapter 1

## Introduction

### 1.1 Introduction

One of the current trends in governance and legal development in Thailand over the last 40 years has been the ongoing move to establish an efficient system of safeguards of civil rights and liberties, and in so doing to institute effective curbs on state powers in order to promote democracy. An important step in this direction was instituted by the Constitution of Thailand 2540 B.E. (1997).<sup>1</sup> This constitution, as revised by the Constitution of Thailand 2550 B.E. (2007),<sup>2</sup> was considered by many to be the most radical political and administrative reform in Thailand so far in its creation of a number of new accountability institutions i.e. an Ombudsman,<sup>3</sup> a National Counter Corruption Commission, an Electoral Commission, a Constitutional Court and Administrative Court. All of these new institutions were designed with the aim of minimizing bureaucratic domination, the corruption of politicians and the instability caused by coalition governments.<sup>4</sup> These institutions were designed to control the political process, and to a certain extent to provide – in a sense as intended by the constitutional drafters- ‘a fourth branch of the state’,<sup>5</sup> an inspection branch of the constitution to complement the traditional executive, legislative, and judicial branches. When the 1997 Constitution was abolished by a military coup in 2006 and replaced by the 2007 Constitution, these new institutions remained, with their functions and powers largely unchanged, and in some cases expanded.

This thesis is focussed on the study of one of key constitutional innovations of the 1997 constitution, the Ombudsman, and offers an exploration of the

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<sup>1</sup> Hereafter the 1997 Constitution. An entire chapter (Chapter XI) of the Constitution is devoted to the Ombudsman, providing for the establishment of the institution, the manner in which the Ombudsman is appointed, the extent of his jurisdiction, his powers, the procedure to be followed when investigating, and other matters, including that an annual , see Andrew Harding, Peter Leyland, ‘The constitutional courts of Thailand and Indonesia: Two case studies from South East Asia’, *Journal of Comparative Law*, 2008, 3(2): 118: 132, 136); Tom Ginsburg, ‘Constitutional afterlife: the continuing impact of Thailand’s postpolitical constitution’, *International Journal of Constitutional Law*, 2009, 7 (1): 83.

<sup>2</sup> Hereafter the 2007 Constitution.

<sup>3</sup> There are three Ombudsmen, but this work will address them collectively in a singular form.

<sup>4</sup> James R Klein, ‘The Constitution of the Kingdom of Thailand 1997: A Blueprint for Participatory Democracy, the Asia Foundation Working Paper Series, March 1998.

<sup>5</sup> Borwornsak Uwanno, ‘Depoliticising key institutions for combating corruption: The new Thai constitution’, *King Prajadhipok’s Institute Journal*, 2000, p. 190, retrieved 4 December 2013, <http://press.anu.edu.au/wp-content/uploads/2013/03/ch11.pdf>.



underlying premise of the reforms that the introduction of the 'fourth' branch would enhance scrutiny and democracy. It should be noted, however, that in the final stage of this thesis the 2007 Constitution was abolished by a military coup, which seized state power on 22 May 2014. This thesis, therefore, has in part become an historical analysis of a defunct constitutional arrangement. But this study has not become irrelevant and the value in understanding and interrogating the effectiveness of the pre-coup system of government as it relates to the Ombudsman remains strong. This is because first the Ombudsman institution remains in place, notwithstanding the coup, and secondly, the coup leader, in his plan to restore democracy has appointed a Constitution Drafting Committee to craft a new constitution.<sup>6</sup> In this respect, the timing of this thesis is arguably rather fortuitous as it is now the time to consider successes and failures of past political reforms and the previous Constitutions in order to gather information for deliberation in the drafting of a new constitution that genuinely suits the context of Thai society and democratic development. The author believes that, based on the evidence that these 1997 constitutional innovations have survived through the coup in 2006, was affirmed in the 2007 Constitution and at present have continued to function under martial law, this may suggest the continuation of these oversight mechanisms beyond the survival of the formal constitutions as a legally binding document; and therefore it is likely that they will be retained in the new constitution. As Ginsberg observed, despite its formal rescind by the coup, the 1997 Constitution has brought a change to the Thai constitutional model.<sup>7</sup> It is hoped that the new constitution will foster democratic development, create government that truly represents the Thai people and provide a system that supports the work of the executive branch and restrain the use of its power under the rule of law.

It is in the context of a re-evaluation of all aspects of the Thai Constitution, therefore, that this thesis focuses on the Ombudsman institution.<sup>8</sup> The 1997 Constitution established the Ombudsman as an independent and non-partisan officer to deal with grievances where no remedy is available in court, because the matter was not justiciable as no legal right was infringed. The Ombudsman is to investigate complaints from citizens about the way in which they have been treated by

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<sup>6</sup> Aekarach Sattaburuth, 'New charter framework by Dec 29', *Bangkok Post*, 20 November 2014.

<sup>7</sup> Ginsburg, n. 1, 72.

<sup>8</sup> This thesis confines its discussion to the public sector ombudsman with general jurisdiction.

government officials, where it finds them justified, proposing a remedy to reconstitute individual rights, and helps to enhance the reputation of government. The 1997 Constitution might be described as creating a traditional and classic form of ombudsman, one which is based upon ombudsman schemes from around the world. This idea will be explored further in Chapter 3 of this thesis. The 2007 Constitution, however, enlarged the Ombudsman's remit by entrusting it with two important additional functions: first, monitoring and evaluating compliance with the Constitution's provisions, as well as providing recommendations on necessary constitutional amendments; and second supervising the ethical conduct of political office holders and government officials. The former function allows the Ombudsman to scrutinize whether the execution of public administration by the executive and its administrative branch is carried out according to the state policy set forth in the constitution, while in the latter the Ombudsman is empowered to determine alleged breaches of ethical conduct of both the holders of political positions and all kinds of public officials which will initiate disciplinary action for public officials and the removal procedures for persons who hold political positions. The 2007 constitution, therefore, transformed the Thai Ombudsman into a very expansive form of ombudsman scheme, one which is arguably unique in the ombudsman world, as will be explored further in Chapter 4.

The Ombudsman is an important constitutional mechanism to 'safeguard the rights of the people' and also to contribute more in 'inspecting the exercise of state power.' However, so far the efficiency of the Ombudsman's institution in Thailand has not been very high, as the empirical research in this thesis will demonstrate. This apparent lack of efficiency could be due to the relative 'novelty' and insufficient practical experience of this institution. However a recent study on the Thai Ombudsman has suggested that the Office is failing and that this is partly caused by it possessing too many diversified functions.<sup>9</sup> It may also be that the critics of the ombudsman in Thailand fundamentally misunderstand the manner in which the office operates. The ombudsman office is generally established to fulfil certain functions or to fill gaps in existing constitutional provision, as circumstances require

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<sup>9</sup> Siriya Promradyod, *Problems in Legal Position of the Thai Ombudsman*, Master's Degree Thesis, Thammasat University, Bangkok, 2010.

and statutory authority allows.<sup>10</sup> Its value lies in its ability to perform well those functions and responsibilities that other institutions cannot do and it is unwise to measure its success by the same means as, for instance, the courts.<sup>11</sup> But the criticisms need to be taken seriously, for it is also argued that an ombudsman office should not try to do too much or to aspire to take over the roles of other institutions or to perform tasks for which it is not well fitted; otherwise its effectiveness will be reduced and will risk abolition or emasculation.<sup>12</sup> There is a sense that the Ombudsman scheme in Thailand may be falling into this trap.

In view of this adverse consequence, it is very much appropriate to undertake a comprehensive analysis of the functioning of the institution to discover any limitation in its structure or function affecting the work of the Ombudsman in order to suggest steps that might be taken to strengthen the institutions' position as a mechanism for administrative justice. Underpinning this study is the belief that the Ombudsman is designed to fulfil the constitutional aspiration to protect the citizens against the exercise of state power by public officials in the performing of public functions. In the furtherance of this goal, in this Introduction Chapter the following aspects are identified, and justification for each is advanced: the research questions of the thesis, the methodological approach that will be adopted to answer the questions, and the potential contribution of the thesis to the wider academic literature. The chapter ends with an overview of the organisation of the thesis.

## 1.2 The aims of the research

The study is underpinned by the widely accepted constitutional theory that the ombudsman institution has unique advantages in providing administrative

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<sup>10</sup> Trevor Buck, Richard Kirkham and Brian Thompson, *The Ombudsman Enterprise and Administrative Justice*, Ashgate, Surrey, 2011, p. 16; Mary Seneviratne, *Ombudsman Public Service and Administrative Justice*, Butterworth, London, 2002, p. 7.

<sup>11</sup> Seneviratne, n. 10, p. 11-12; Ibrahim al-Wahab, *The Swedish Institution of Ombudsman*, Stockholm, Centraltryckeriet AB Boras, 1979, p. 14-15; Vicotr O Ayeni, 'Ombudsman Institution and Democracy in Africa-A Gender Perspective', *The International Ombudsman Yearbook*, 61, 1997, p. 17-18; Dennis Pearce, 'The Ombudsman: Review and Preview-The Importance of Being Different', *The Ombudsman Journal*, No. 11, 1993, at 35.

<sup>12</sup> Roy Gregory & Philip Giddings, 'The ombudsman institution: growth and development', in Roy Gregory & Philip Giddings (eds.), *Righting Wrongs: The Ombudsman in Six Continents*, IOS Press, Amsterdam, 2000, p. 1-20; L Hurwitz, *The State as Defendant Governmental Accountability and the Redress of Individual Grievances*, Aldwych Press, London, 1981, p. 102.



justice.<sup>13</sup> The normative vision commonly offered in favour of an ombudsman is that the institution offers an independent mechanism to receive and consider complaints from aggrieved citizens against government officials in carrying out their duties. Such a service is necessary given the limitations inherent in the political measures offered to redress individual grievances and the cumbersome procedure and strict legal approach of judicial review in handling administrative justice.<sup>14</sup> It is also acknowledged that the ombudsman institution is an evolving concept and its limits have yet to be identified.<sup>15</sup> Around the world offices have been assigned to perform an increasing variety of functions in addition to its traditional role in administrative justice. The experiences of ombudsman schemes globally have shown that the office can be successful in some roles while they may have only limited contributions to make in other roles. In this regards, this study is also informed by the argument in the main literature by both scholars and practitioners that while it is important that an ombudsman can adjust to respond to the need required by the context in which it has been adopted, it is equally important that in order to be effective there are essential institutional design features of the ombudsman that must be adhered to whatever the exact mandate.<sup>16</sup>

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<sup>13</sup> Stephen Owen, 'The expanding role of the ombudsman in the administrative state', *University of Toronto Law Journal*, 40, 1990, 70-686; P Nikiforos Diamandouros 'Legality and good administration: is there a difference?', Speech at the Sixth Seminar of National Ombudsmen of EU Member States and Candidate Countries on 'Rethinking Good Administration in the European Union', Strasbourg, France, 15 October 2007, retrieved 26 November 2013, <http://www.ombudsman.europa.eu/speeches/en/2007-10-15.htm>; Buck et al., n. 10.

<sup>14</sup> Marten Oosting, 'The Ombudsman and his environment: A global view', *The Ombudsman Journal*, No 13, 1995, p. 1; Richard Kirkham, 'The 21st Century Ombudsman Enterprise', paper presented to the IOI biennial conference, November 2012, Wellington, New Zealand, retrieved 23 May 2013, <http://www.theioi.org/downloads/o32s/Wellington%20Conference%20Plenary%20II%20Richard%20Kirkham%20Paper.pdf>; M A Marshall and Linda C Reif, 'the Ombudsman: Maladministration and Alternative Dispute Resolution', 34, *Alberta Law Review*, 1995, 215.

<sup>15</sup> Charmaine A J Pemberton-Carrington, 'The Ombudsman and development: Structural Adjustment and its effect on the Ombudsman institution', *The Ombudsman Journal*, No. 13, 1995, p. 141; Christ Field, 'Recent evolutions in Australian Ombudsmen, presentation to the Australian Institute of Administrative Law National Forum 2009, retrieved, 2 January 2012, <http://www.aial.org.au/Publications/webdocuments/Forums/Forum63.pdf>; Anita Stuhmcke, 'The Evolution of Classical Ombudsman : a view from the antipodes', *Int. J. of Public Law and Policy*, Vol.2, No.1, 2012, at. 1; P Jiaying and L I Cheong, *Comparative Study of Ombudsman Systems of Asia*, comparative Studies of Ombudsman Systems in Asia jointly sponsored by the Commission against Corruption of Macao, China, and the Macao Foundation, 2008.

<sup>16</sup> John McMillan, 'The expanding Ombudsman Role: What fits? What doesn't?', presentation to Australia Pacific Ombudsman Region meeting in Melbourne on 27 March 2008, retrieved 15 November 2013, [http://www.ombudsman.gov.au/files/27\\_March\\_2008\\_The\\_expanding\\_Ombudsman\\_role\\_What\\_fits\\_What\\_doesnt.pdf](http://www.ombudsman.gov.au/files/27_March_2008_The_expanding_Ombudsman_role_What_fits_What_doesnt.pdf); Pearce, n. 11, p. 17; Anita Stuhmcke, 'Discretion, Direction and the Ombudsman: To Steer the Ship or to Choose the Ship?', Conference Papers Wellington, 2012, retrieved 15 November 2013, <http://www.theioi.org/publications/wellington-2012-conference-papers>; Stephen

Set within this context, this thesis has three main goals. First, it aims to examine the functions of the Ombudsman institution in Thailand to discover how it measures up to its objectives, as well as standard practice in the ombudsman world. Secondly, the thesis aims to review its institutional design. It is especially concerned with whether it is in line with the standard features of the ombudsman that can be identified from a range of literature and guidance on the topic. Thirdly, the thesis aims to establish whether the Thai Ombudsman operates with an excessive remit and identify whether its existing collection of roles is appropriate (or incompatible with the ombudsman's principle).

This aim is achieved through the following research strategies:

- examining the conditions underpinning the establishment and evolution of the institution of the Ombudsman in Thailand;
- analysing the generic concept of the institution of the Ombudsman and considering its place in the system of government in Thailand
- studying the regulatory framework of the Ombudsman
- identifying key functions of the Ombudsman
- studying specific features of the Ombudsman
- examining the additional functions of the Ombudsman and their implications on the standing of the office;
- looking into the effectiveness of the Ombudsman in Thailand in terms of its practical impact and considering the ways in which it may be improved to enhance this impact

This thesis is written from a socio-legal perspective in the sense that it does not look at the law alone but considers also how law surrounding the Ombudsman in Thailand has been implemented and enforced in the context of broader social and political theories.<sup>17</sup> Frequently in the study of the ombudsman it is not 'law' as such that has attracted the interest of scholars, rather the focus of attention has tended to be upon actual performance of the institution. It is pointed out that what matters in

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Owen, 'The Ombudsman: Essential Elements and Common Challenges', in Linda C Reif (ed.), *The International Ombudsman Anthology*, Kluwer Law International, the Hague, 1999, p. 51-71.

<sup>17</sup> S Wheeler and P A Thomas, 'Socio-Legal Studies' in D J Hayton (ed.), *Law's Future(s)*, Hart Publishing, Oxford, 2002, 271; John Baldwin and Gwynn Davis, 'Empirical Research in Law', Chapter 39 in Peter Cane and Mark Tushnet, *The Oxford Handbook of Legal Studies*, Oxford University Press, 2003, p. 880-881.

the end is not the theory of ombudsmanship, but the impact of the role.<sup>18</sup> Central to the study is the analysis of the empirical findings as to whether the Thai Ombudsman can perform according to their legal mandate and expectation and whether the scheme can adhere to its essential features.

### 1.3 Methods

This study adopts a socio-legal perspective of which its approach has been described as essentially descriptive and explanatory.<sup>19</sup> However this study in a broad sense makes a primary evaluation of the Thai Ombudsman scheme, in line with Danet's approach in which she describes evaluation as 'the analysis of a set of activities to test whether they contribute effectively toward the pursuit of some goals or goal.'<sup>20</sup> There are many approaches that could be taken towards the study of the Ombudsman. In this study empirical research is considered appropriate as empirical research in law aim to study the institutions, rules, procedures and personnel of the law through direct methods rather than secondary sources, with a view to understanding the way they operate and what effects they have.<sup>21</sup> In this thesis therefore the enquiry concerns the actual performance of the scheme. This performance will be examined so as to find out how the legal mandates of the Thai Ombudsman have been translated into action. This empirical study of the performance of the Thai Ombudsman is supported by an examination of its institutional features in order to establish whether the structure of the scheme best guarantees that the minimum conditions for an effective ombudsman institution exist.

The research conducted in this thesis is primarily documentary, supplemented by a series of elite interviews.<sup>22</sup> For documentary analysis, the document used published materials; official documents include statutes, Parliamentary debates, annual reports, investigation reports, complaints statistics, and articles by ombudsmen, newspapers, journals and periodicals. The aim of this mode of research is to investigate a range of academic, theoretical and policy-based opinions on the ombudsman institution, the purpose for establishing the Thai Ombudsman office, the

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<sup>18</sup> Fredrik Ugglä, 'The Ombudsman in Latin America', *Journal of Latin American Studies*, Volume 36, Issue 03, August 2004, p. 423-450.

<sup>19</sup> Baldwin and Davis, n. 17, p. 880.

<sup>20</sup> B Danet, 'Towards a Method of Evaluation the Ombudsmen', *Administration and Society*, 10(3) 335, 1978, 340.

<sup>21</sup> Baldwin and Davis, n. 17, p. 880.

<sup>22</sup> List of the interviewees and justification for this method is discussed below under Section 1.5.



expectation of it and the powers and functions of the Thai Ombudsman as provided by law and its actual practice. Complaints statistics have also been used to gauge the performance of the Ombudsman as they are useful in revealing the volume of complaints, their subject matter, the proportion investigated and the outcomes. The annual reports and statistics can reveal important measures about the operation of the office, including the statistics available relating to the work load, throughput times, the number of justified complaints and whether the matter was rectified.

Interviews are also important in order to investigate in more detail the information found in the documents, and to discover perceptions of the system. Interviews give atmosphere and colour to a study, sometimes revealing entirely new information and thus offering another dimension of understanding.<sup>23</sup> The data obtained from desk-based research will be supported by data obtained through a series of elite interviews using semi-structured questions. They can reveal any gaps in the documentation, and the underlying motives and how the Ombudsman and the parties concerned perceive what they do.<sup>24</sup> The perception of stakeholders could be an important tool in order to find the performance and effectiveness of the institution. The method adopted in this thesis correspond with method employed in previous research on an individual ombudsman scheme.<sup>25</sup>

## **1.4 Original contribution**

Before the establishment of the Ombudsman in Thailand, a number of studies were conducted into the potential benefits of an ombudsman to Thailand. However since the office's establishment there has been no comprehensive review of its legal framework or its actual functions alongside an empirical study of its work and the perceptions of the Ombudsman amongst concerned stakeholders. This thesis therefore offers an original contribution, particularly by providing the first descriptive data from empirical research on the practice of the Thai Ombudsman, an analysis which has not been conducted before. In addition there has been no holistic low level or high level review of the work of the Ombudsman since it was introduced.

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<sup>23</sup> F Brookman, L Noakes and E Wincup, *Qualitative Research in Criminology*, Ashgate, Aldershot, 1999, p. 137.

<sup>24</sup> Baldwin and Davis, n. 17, p. 880.

<sup>25</sup> For example, Mary Seneviratne, 'Researching Ombudsman', in Reza Banakar and Max Travers (ed.), *Theory and Method in Socio-Legal Research*, Hart Publishing, Oxford and Portland Oregon, 2005, p. 161.

The study provides the first critical qualitative analysis of the overall Thai Ombudsman system, in so doing, contributes to a wider academic discourse on the inherent strengths and limits of the Ombudsman as a constitutional institution. The results of this research could assist constitutional drafters and policy-makers to identify areas of organisational and institutional reform, in order to improve the Ombudsman's effectiveness, efficiency and responsiveness, and in the process, promote democratic governance in Thailand.

It is also claimed that this thesis will add to the still underdeveloped literature on the ombudsman globally. The ombudsman institution is one that is relatively young in constitutional terms. Around the world, many schemes have been established and their operation and interface with other constitutional institutions has received widespread academic attention in many countries and nearly every continent. The empirical findings from my work contribute to inform and update existing theoretical perceptions as to when and how the ombudsman is at its most effective. Further there is an increasing body of literature on the institution in the West but the literature on ombudsmen in Asia is few.<sup>26</sup> This research can serve as a collection and synthesis of data that can be utilized in further research and also provide base literature for those who want to conduct further research and ascertain the foundational criteria for adopting a successful ombudsman scheme.

## **1.5 The Structure of this thesis**

This thesis has 10 chapters which are divided into three main parts:

### **Part One - theoretical foundation**

Following on from the introduction, Part One (consisting of Chapters 2, 3 and 4) draws on the constitutional theory of the liberal democratic modern state to understand why an ombudsman might be needed and what it is that an ombudsman scheme is designed to achieve. It starts from the premise that a basic separation of powers by itself cannot guarantee adequate protection of citizens from abuses of state

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<sup>26</sup> The Ombudsman has arrived in Asia only in 1972 when the first ombudsman office was established in the Indian province of Maharashtra, see Alice Tai, 'Diversity of Ombudsmen in Asia', Conference Papers, Stockholm, 2009, retrieved 23 May 2013, [http://www.theioi.org/downloads/74sji/Stockholm%20Conference%20Back%20to%20the%20Roots\\_Alice%20Tai.pdf](http://www.theioi.org/downloads/74sji/Stockholm%20Conference%20Back%20to%20the%20Roots_Alice%20Tai.pdf).

powers by government. Chapter 3 reflects on a normative understanding of what is/should be the role of an ombudsman system and the essential features that an ombudsman scheme should possess, which will be used for the assessment of the Thai Ombudsman in Part III. The chapter focuses on the ombudsman's accepted core function, which is the pursuit of administrative fairness, and explores the ombudsman's essential features which reflect the principle and manners of operation that support such role. Chapter 4 explores the major non-traditional roles practiced by the existing ombudsman schemes namely fighting corruption and human rights protection. The chapter identifies changes to the fundamental features of ombudsman schemes which are necessary to accommodate such non-traditional roles and also explores the difficulties experienced by such schemes and the factors that affect its effectiveness. This study is done by examining the evidence on the spread of functions in the experiences of ombudsman schemes around the world from the existing literature and will use the experiences to inform the potential problems in the functioning of the Thai Ombudsman.

## **Part Two - Empirical studies**

Part Two of this thesis consists of Chapters 5, 6, 7 and 8. The fifth chapter will demonstrate that the Thai Constitution has attempted to control the use of the state's powers by introducing new independent bodies, with one of them being the Office of the Ombudsman. The purpose for the establishment of the Thai Ombudsman and the constitutional mandate that has been allocated to it will be identified. The following chapters present the findings. Chapter 6 identifies that the primary function of the Ombudsman is to redress administrative grievances and improve administrative practice. It goes on to explore the evidence of the Ombudsman's effectiveness in delivering upon this function. Chapter 7 focuses on the non-traditional functions of the Thai Ombudsman, namely reviewing complaints about the constitutionality of public sector activity, monitoring and evaluating implementation of the provisions of the Constitution by government agencies, and monitoring the enforcement of code of ethics for political office holders and state officials. Here to, evidence is uncovered as to the degree to which the Ombudsman has been able to deliver upon these functions. In this section, Chapter 8 focuses on the Thai Ombudsman's institutional features, in terms of its legal arrangements and

how they are implemented in reality. The robustness of such arrangements are interrogated.

Throughout this thesis, and in this Part II particular, I have examined and analysed the functions of the Ombudsman based on its performance and activities as collected through my empirical studies. The data obtained from desk-based research is supported by data obtained through a series of elite interviews using semi-structured questions. Interviews have been undertaken with the following people: the Thai Chief Ombudsman Panit Nitithanprapas; Ombudsman Professor Sriracha Charoenpanich; Dr. Issarabhath Teerabhathsiri, Director, the Thai Ombudsman Office; Wasan Thepmanee, Public Relations Officer, The Thai Ombudsman Office; Surachai Liengboonlertchai, a member of the 2007 Constitution Drafting Assembly (CDA), former First Vice-President of the Senate (at the time the interview with the author was taken place) and President of the Senate, who gave opinions on the Thai Ombudsman and; Soonton Maneesawat, Professor of Public law and a State Councillor; Banjerd Singkaneti, Professor of Public Law and a member of the Law Reform Commission of Thailand; and Kamol Suksomboon, Inspector-General/Deputy Permanent Secretary to Office of the Prime Minister.

Elite<sup>27</sup> interviewing has for long been a key qualitative research method for social research<sup>28</sup> and its justification in socio-legal studies has been argued.<sup>29</sup> Through this form of research, interviews are utilised for the purposes of allowing researchers to ask open-ended questions and enabling the respondent to talk freely so as to best elicit the interviewees' own accounts of their experiences and perspectives. In this respect, conducting interviews with elites is a useful technique, not only for

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<sup>27</sup> There are various definition of 'elite' but the dominant definition that emerges from reviewing the elite interviewing literature focuses on people in powerful positions: those in senior political and executive roles, see e.g. R Peabody, Webb Hammond, S Torcom, J Brown, LP Thompson, C Kolodny, 'Interviewing Political Elites', *PS: Political Science and Politics*, 1990, 23(3) at 451; L McDowell, 'Elites in the City of London: some methodological considerations', *Environment and Planning*, 1998, 30, 2135; S Rivera, P M Kozyreva, E G Sarovskii, 'Interviewing Political Elites', *PS: Political Science and Politics*, 2002, at 683; B L Leech, 'Interview Methods in Political Science', *PS: Political Science and Politics*, 2002, at 663, D Lilleker, 'Doing Politics, Interviewing the Political Elite: Navigating a Potential Minefield', *Politics*, 2003, 23(3) at 207.

<sup>28</sup> E.g. D R Matthews, *US Senators and Their World*, Vintage Books, New York, 1960; L A Dexter, *The Sociology and Politics of Congress*, Rand McNally, Chicago, 1969.

<sup>29</sup> L Dexter, *Elite and Specialized Interviewing*, Northwestern University Press, Evanston USA, 1970; Keohane King, and S Verba, *Designing Social Inquiry: Scientific Inference in Qualitative Research*, Princeton University Press, New Jersey, 1994, 25-6; A Paterson, *The Law Lords*, Macmillan, London, 1982; Trevor Buck, *Administrative Justice and Alternative Dispute Resolution: the Australian experience*, Department for Constitutional Affairs (DCA), DCA Research Series 9/05, London: DCA, 2005.

gathering rich detail about the thoughts and attitudes of key elites concerning the central issues of the research, but also to serve the purpose of confirming the accuracy of information that has previously been collected from documentary sources. Elite interviews can also be to test ideas and hypotheses about the subject-matter with participants who are very knowledgeable and have a relevant interest in exploring those ideas with the interviewer.

As with all research techniques, elite interviewing has to be treated with caution, which is why in this thesis care has been taken in most instances to support the findings obtained from the interviews held with other data. Due to the social status of elite research participants, the literature on elite interviewing frequently points to issues around the power imbalance between interviewers and elite interviewees.<sup>30</sup> In particular, the unequal power relationship in an interview can have an impact upon the reliability of data quality gathered via the interview.<sup>31</sup> One major concern is that interviewees are in a position to manipulate information.<sup>32</sup> In addition, the elites tend to feel that they represent their organizations to the outside world and therefore it is not uncommon for researchers to hear the ‘public relations’ version instead of their personal account.<sup>33</sup>

Whilst being aware of the risk, the potential for being manipulated was not a major factor in this study. For one of the interviewees there was already an established contact with (the interviewee is the founder of the Law Department (Professor Sriracha Charoenpanich) where the author is working). This connection helped also to decrease the perceived gap in status between the researcher and all the elite interviewees. It is suggested that gaining the interviewees’ trust and establishing rapport with them proved invaluable in obtaining the interviewees’ own perception.<sup>34</sup> In this research the author, a PhD student writing an academic research, was deemed by the office holders as a ‘neutral outsider’ which, according to Welch, is trusted as she/he can be perceived not to pose any threat to the interviewees’ status and

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<sup>30</sup> C Welch, R Marschan-Piekkari, H Penttinen, N Tahvanainen, ‘Corporate elites as informants in qualitative international business research’, *International Business Review*, 11, 2002, 625.

<sup>31</sup> Anna Boucher, Ahmar Mahboob & Lydia Dutcher, ‘Power and solidarity in elite interviews’, A paper for the American Political Science Association General Meeting, Chicago, 28 August – 1 September, 2013.

<sup>32</sup> D Richards, ‘Elite Interviewing: Approaches and Pitfalls’, *Politics*, 1996, 16(3), 201; Lilleker, n. 27, 211.

<sup>33</sup> Robert Mikecz, ‘Interviewing Elites: Addressing Methodological Issues’, *Qualitative Inquiry*, 2012, 18(6), 484.

<sup>34</sup> Welch, n. 30; E C Sabot, ‘Dr. Jekyll, Mr. H(i)de: The contrasting face of elites at interview’, *Geoforum*, 1999, 30.

position.<sup>35</sup> Building on this observation, in my experience the elites perceived the interview as an opportunity to have an informed discussion. Welch found that of various feedback procedures the most successful was sending a draft report to key informants for the purpose of checking accuracy and obtaining additional data.<sup>36</sup> In this regard, the draft research report was sent to the key informants for the same reasons.

### **Part Three – Evaluation and conclusion**

Chapter 9 is an analysis chapter which brings together the problems in the operation of the Ombudsman that have been identified and discussed in the forgoing chapters. Based on the analysis, this thesis argues that, despite limitations and shortcomings the Ombudsman has already made an important contribution to the protection of citizens' rights and helped improve administrative practice. However, if it were to make an even better contribution then some changes would be needed to the areas of performance issues, mandates and institutional design. The chapter offers recommendations for improvement of the scheme and remarks in relation to the ombudsman scheme in general. The final chapter, Chapter 10, will be a short chapter which summarises the findings of earlier chapters.

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<sup>35</sup> Welch, n. 30.

<sup>36</sup> Welch, n. 30, at 624.



## **PART I – THEORY AND CONTEXT**

# Introduction

‘If the state is strong, it will crush us; if it is weak, we will perish.’<sup>1</sup>

This thesis works from the premise that the best argument for deployment of an ombudsman institution is that the office is a vital constitutional tool in the aspiration of promoting good government and administrative justice. In this section of the thesis I will start from the premise that a ‘good government’ is created to protect individual rights and promote the welfare of society.<sup>2</sup> To guarantee that individuals enjoy their private lives, a government is therefore vested with public powers sufficient to discharge its duties.<sup>3</sup> But, once established, there is a risk that in carrying out its functions, government power can become excessive.<sup>4</sup> In order to prevent such an outcome, a liberal constitution secures individual rights and controls the exercise of state power. It does this by creating a framework wherein governmental institutions can work efficiently, but within the restraint and control of mechanisms that limit governmental power.<sup>5</sup> Debates about the ombudsman enterprise fit squarely within this requirement to construct appropriate control mechanisms.

Famously, the doctrine of the separation of powers has been a key liberal constitutional technique used to achieve such control. The doctrine’s tripartite model creates a ‘check and balances’ system to prevent one person or a group of persons possessing dominating powers and to tackle the risk of arbitrariness and abuse of power. This way the rule of law can be achieved and the rights and liberties of the people are protected. But in the modern state administration system, control through the tripartite model alone may not be sufficient to provide satisfactory control over the exercise of public powers. The scale of state activities has risen resulting in the

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<sup>1</sup> Paul Valery as quoted by Vito Tanzi, ‘The Changing Role of the State in the Economy: A Historical Perspective’, IMF Working Paper, 1997, p.1, retrieved 11 December 2011, <http://www.imf.org/external/pubs/ft/wp/wp97114.pdf>.

<sup>2</sup> This practice is based upon a classical liberal theory of governance; see generally Richard A. Epstein, *The Classical Liberal Constitution: The Uncertain Quest for Limited Government*, Harvard University Press, 2013.

<sup>3</sup> John Locke, *The Second Treatise of Civil Government* (1690), Chapter 2, based on the paperback book, *John Locke Second Treatise of Government*, edited, with an Introduction, by C B McPherson, Hackett Publishing Company, Indianapolis and Cambridge, 1980.

<sup>4</sup> William Pitt, speech, Hansard (House of Lords), 9 January 1770, col. 665.

<sup>5</sup> For example, Eric Barendt, *An Introduction to Constitutional Law*, Oxford University Press, London, 1998, p. 21; Bruce Ackerman, ‘The New Separation of Powers’, 113 *Harvard Law Review*, 2000, p. 685.

increase in the discretionary powers given to the executive. This has led to a need for additional protection against administrative arbitrariness. In particular, a regular experience which evolving constitutions has been the lack of available redress for those aggrieved by administrative decisions while promoting good administration in public service is becoming an increasingly important issue.<sup>6</sup>

These challenges to the control of governmental power are of especial concern in new or emergent democracies, where human rights violations and corruption remain endemic problems.<sup>7</sup> In particular, there is real scepticism about the efficiency of democratic control alone to reward or punish politicians through free and fair elections. Meanwhile, judicial review is restricted to questions of legality only. Therefore, there is a widely accepted argument that the actions of governments must be subjected to additional external examination by organisations outside of the ordinary political and legal processes.<sup>8</sup> The overall goal remains making government accountable to its citizens, but the addition of new tools of accountability is necessary.

As a result of these pressures, ‘accountability institutions’<sup>9</sup> have been created in many countries across the world. These bodies operate independently, and often outside the legislative and judicial spheres. Their purpose is to oversee governmental actions in the areas of the particular body’s specialised functions. One of these ‘accountability institutions’ is the ombudsman. From the first ombudsman created in Sweden (1713), the institution of the ombudsman later spread to European and some Commonwealth countries, and from the mid-1950s onwards ombudsman institutions have spread quickly around the world. The worldwide spread of the Ombudsman idea is well-covered and therefore there is no need for detailed description of that phenomenon here.<sup>10</sup> Suffice it to say, for the purposes of our discussion, that starting

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<sup>6</sup> Daniel C Esty, ‘Good Governance at the Supranational Scale: Globalizing Administrative Law’, 115 *Yale Law Journal*, 2006, 1490.

<sup>7</sup> Andreas Schedler, ‘Introduction’, in Andreas Schedler, Larry Diamond, and Marc F Plattner (eds.), *The Self-Restraining State: Power and Accountability in New Democracies*, Lynne Rienner Publisher, London, 1999.

<sup>8</sup> *ibid.*, also Trevor Buck, Richard Kirkham and Brian Thompson, *The Ombudsman Enterprise and Administrative Justice*, Ashgate, Surrey, 2011, p. 16.

<sup>9</sup> *ibid.*

<sup>10</sup> For example, L B Hill, ‘International Transfer of the Ombudsman’ in R L Meritt (ed.) *Communication in International Politics*, University of Illinois Press, Urbana, 1972; L B Hill, ‘Institutionalization, the Ombudsman, and Bureaucracy’, *Amer. Pol. Sci. Rev.* 68, 1974, 1075; Donald C Rowat ‘The Spread of the Ombudsman Plan in Western Europe’ Occasional paper no 21, IOI, February 1983; G E Caiden (ed.) *International Handbook of the Ombudsman: Evolution and Present Function*, Greenwood Press, Westport 1983; Donald C Rowat, ‘The Spread of the Ombudsman Idea in the United States’, Occasional Paper no. 26, IOI, April 1984; Donald C Rowat, *The Ombudsman Plan: The Worldwide Spread of an Idea*, 2<sup>nd</sup> edn., University Press of America, Lanham, 1985; B Thomson, ‘Spatial Diffusion of the

from the early 1950s and within half a century the ombudsman concept rapidly became a worldwide known idea, a universally acknowledged oversight mechanism for promoting better administration.<sup>11</sup> According to the International Ombudsman Institute (IOI), there are now ombudsmen in around 175 countries around the world.<sup>12</sup> The role of the ombudsman is deemed by some as worthy of consideration alongside the role of 'traditional' constitutional institutions, that is, the legislature and the judiciary, in upholding certain constitutional values, such as the rule of law and good administration.<sup>13</sup>

This thesis adopts from the premise that a complete study of the ombudsman ought to begin with an analysis of the roles of the modern constitution, in order to identify the potential contribution of the ombudsman within it. Therefore Part I of the thesis concerns this important context for the subsequent discussion. Part I is divided into three chapters. Chapter 2 will describe the evolving constitutional doctrine of separation of powers as a tool to restrain the exercise of public power. It will then address the strengths and weaknesses of the separation of powers doctrine as a constitutional device to control government in the modern state. Chapter 3 focuses on the theoretical context in which the ombudsman operates. It reviews literature on the traditional role of ombudsman and then seeks to understand the basic institutional design characteristics of the ombudsman institution. Chapter 4 examines various models as developed in ombudsman practice around the world and will chart the conferral of additional functions on the ombudsman institutions. The aim of this part of the thesis is to understand the contribution of the ombudsman to the overall governance system in modern democracies.

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Ombudsman Institution: African Adaptations of a European Innovation-The Consolidation Problem', 10 *The Ombudsman Journal* 57, 1992; John Robertson, 'The Ombudsman Around the World', in Linda C Reif (ed.), *The International Ombudsman Yearbook* 112, 2, Kluwer Law International, The Hague, 1998.

<sup>11</sup> Buck et al., n. 8, p. 53.

<sup>12</sup> International Ombudsman Institute, February 2015, IOI Regions, retrieved 4 February 2015, <http://www.theioi.org/ioi-regions>.

<sup>13</sup> Buck et al., n. 8, p. 52. There are several ways in which the role of the ombudsman in the constitution can be conceptualised, see Chris Gill, 'The evolving role of the ombudsman: a conceptual and constitutional analysis of the 'Scottish solution' to administrative justice', *Public Law*, October, 2014, pp. 674-9.

## **Chapter 2**

# **Positioning the Ombudsman in the Constitutional Structure**

It is widely accepted that the exercise of public power must be constrained by the constitution in order to protect the rights and liberties of the citizen, and to prevent arbitrary government.<sup>14</sup> In most liberal democracies, constitutional thinking has majored on the legislature and judiciary, which respectively provide legal and political control over the executive branch. However, experiences in many countries have demonstrated flaws in these traditional mechanisms and over at least the last century constitutional design has steadily evolved to incorporate a new variety of institutions, including the ombudsman, to provide additional control over the government in areas in which traditional control is not effective.

This chapter explores the background context for the emergence of the ombudsman and the framework within which it operates. It is divided into four sections. The first section describes the importance of the constitution as a tool in limiting state power and protecting the rights and liberties of the people, including the key constitutional features of liberal democracy: the separation of powers. The second section discusses the control provided by the constitutional mechanisms such as the legislature and the judiciary and the inadequacy of such control. Section three addresses the emergence of new institutions, especially the ombudsman, as additional machinery in the constitution. Section four provides overview of constitutional development in Asia. The chapter ends by addressing concerns that Thailand is not yet ready for a constitution fully based on liberal democratic values.

### **2.1 Constitutions and controlling of public power**

At the core of constitutional theorizing in the liberal tradition is the idea that the primary state function is the protection of life, liberties, and property, together with

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<sup>14</sup> Thomas Fleiner, Lidija B Fleiner, *Constitutional Democracy in a Multicultural and Globalised World*, Springer Science & Business Media, Berlin, 2009, p. 155.

all other functions that are necessary to the civic organization of society.<sup>15</sup> A government is created to carry out these tasks.<sup>16</sup> This perspective is as true as in Thailand as any other country or society in the world. In order to function effectively it must possess the capacity to govern. But, history has shown that those who hold public power, without adequate oversight and control, can use it arbitrarily or to serve their own interest. If we consider the histories of many countries around the world, we can see continual attempts to make those who exercise governmental power respect and recognize the fundamental rights and liberties of individuals.

### 2.1.1 Constitutions as a means of protecting individual rights and liberty

A key method to restrain the government from arbitrary use and abuse of power has been to subject those who hold public power to law; early examples of this method are the Magna Carta in England and the Hindu *Dharmasatra*.<sup>17</sup> Today a hallmark endeavor to limit government power by law is the acceptance of the written constitution as the fundamental law of the polity. Constitutions are designed to control the exercise of political power by determining the form of state governance, organise the structure of mechanisms in administering the state, regulate the exercise of their powers and, most importantly, provide a legitimate source of political power.<sup>18</sup>

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<sup>15</sup> In this thesis I do not intend to explore the foundations of public law theory in great depth. However, the conclusion that the preservation and promotion of the liberties of the individual is the central function of the constitution is a common one amongst theorists in this area. For an introduction see Fleiner et al., n. 14, p. 155.

<sup>16</sup> The necessity of government is reflected in the manner that Thailand's constitution has evolved. The function of the government was first elaborated in writing by the 1932 coup leader in the first statement issued after the successful overthrow of King Rama VII, which ended the absolute regime of the monarch. In governing the state, the coup aimed to achieve six objectives:

- 1) Maintain the nation's economic and political independence.
- 2) Maintain public safety and reduce crime. Nurture economic prosperity. Ensure job security for all people.
- 3) Adopt national economic plan and guarantee well-being - no one will be left to starvation.
- 4) Ensure equal rights for all.
- 5) Protect people's freedom and liberties provided that it is not contrary to the above.
- 6) Provide education for all people.

<sup>17</sup> Influenced by Indian civilisation, royal judgment or decision of The Thai monarchs necessarily had to be consistent with the *Thammasat* or the Thai version of the Hindu *Dharmasatra*, see S Viraphol, 'Law in Traditional Siam and China: A Comparative Study', 65 *Journal of the Siam Society* 81, 1977, at 93-100.

<sup>18</sup> Larry Alexander, 'Constitutionalism' in Thomas Christiano, John Christman (eds.), *Constitutionalism Contemporary Debates in Political Philosophy*, San Diego Legal Studies Paper No. 07-04, 2005, retrieved 12 August 2014, SSRN: <http://ssrn.com/abstract=802885>; Starting with the Constitution of the United States (1787), constitutions have generally been confirmed in a single codified document, containing provisions that limit the exercise of power of the government or other holders of public powers and guarantee basic rights and freedoms, the first French Constitution (1791) prescribed rights guaranteed by the Constitution (such as the right to assemble peaceably and without



Since at least the First World War, countries around the world have regularly adopted constitutions which observe to a certain extent human rights, the rule of law, judicial review, limited government and the separation of powers.<sup>19</sup> Increasingly written constitutions have become the standard form for democracy, protection of basic rights and the rule of law.<sup>20</sup> Thailand is one example of this wider trend.<sup>21</sup>

### 2.1.2 The traditional theories of separation of powers

Merely endowing democratic and statutory legitimacy to public powers, subjecting public bodies to law or expressly prescribing fundamental rights under the constitution would not be adequate to prevent the government from becoming despotic, as long as governments are run by human beings who, if left unrestrained, will be tempted to abuse power.<sup>22</sup> A key solution to this dilemma in liberal writing has been the doctrine of separation of powers as a model for the government of a state that can prevent dangerous concentrations of power forming.

Montesquieu formulated the doctrine of the separation of powers by dividing state functions and each function is assigned to three separated parallel branches which are: the legislature makes the law; the executive puts the law into effect; and the judiciary uses the law to settle disputes.<sup>23</sup> His reasoning was that if the executive and the legislative functions of government are exercised by the same person or body, there is a danger of the legislature enacting oppressive laws which the executive will enforce

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arms) as 'natural rights' that the legislative power may not make any law infringe upon (i.e. right to assemble peaceably and without arms). The Federal Republic of Germany (1949) set forth certain rights as 'basic rights' and stipulated that they cannot be restricted.

<sup>19</sup> For example, Louis Henkin, 'A New Birth of Constitutionalism: Genetic Influence and Genetic Defects', 14 *Cardozo L. Rev.* 533, 1992 - 1993; M J C Vile, *Constitutionalism and the Separation of Powers*, Liberty Fund, Indianapolis, 1998, p. 7.

<sup>20</sup> For example constitution of Australia (1900), Mauritius (1968), Cyprus (1960), Tanzania (1965); for descriptions of how constitutionalism has swept to the world, see generally Samuel Huntington, *The third wave: democratization in the late twentieth century*, University of Oklahoma Press, 1993; Bruce Ackerman, *The Future of Liberal Evolution*, Yale University Press, 1992; S A de Smith, *The New Commonwealth and its Constitutions*, Penguin, London, 1973, Part I; Mary Kaldor & Ivan Vejvoda (eds.), *Democratization in Central and Eastern Europe*, Continuum, London, UK, 2002; Ian Jeffries, *The Countries of the Former Soviet Union at the Turn of the Twenty-first Century*, Routledge, New York, 2004; more discussion see Jörg Menzel, 'Constitutionalism in Southeast Asia: Some Comparative Perspectives', in Clauspeter Hill and Jörg Menzel (eds.), *Constitutionalism in Southeast Asia*, Vol. 3, Konrad-Adenauer-Stiftung, Singapore, 2009, pp. 9-11.

<sup>21</sup> This issue is to be discussed in more depth in section 2.2.3.

<sup>22</sup> E G Henderson, *Foundations of English Administrative Law*, Harvard, 1963, p. 5.

<sup>23</sup> Montesquieu, *De l'esprit des lois* (1748), in Anne M Cohler, Basia Carolyn Miller, and Harold Samuel Stone (eds.), *Cambridge Texts in the History of Political Thought*, Cambridge University Press, Cambridge, 1989.

to attain its own ends. The same applies to the judiciary, which therefore should be separated from the legislature and the executive. The doctrine is thus widely referred to as the tripartite institutional system.

The doctrine of separation of powers has become the essence of liberal constitutions since the eighteenth century, guaranteeing limited government in order to safeguard the rights of the people. For example, Madison addresses the means to create appropriate check and balances and advocates a separation of powers within the government in the drafting of the US Constitution.<sup>24</sup> Likewise, the French Declaration of Rights of Man of 1789, article 16 states ‘Any society in which the safeguarding of rights is not assured, and the separation of powers is not established, has no constitution.’

The separation of powers doctrine in modern times serves as a key principle of liberal constitutional thought on how the institutional structures within a constitution should be arranged,<sup>25</sup> with many recent developments designed to refine and safeguard a clearer separation of the three branches.<sup>26</sup>

## **2.2 Inadequacy of control under the separation of powers**

Despite its influential position in conceptual liberal democratic thought and its practical strength as described above, the tripartite model is viewed by many as an insufficient means to cope with the changes in the government structure that have occurred over the last century. Two features of modern governments commonly identified as undermining the effectiveness of the tripartite structure in restraining the power of the executive are the partisan support in the political party system and the

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<sup>24</sup> James Madison, ‘Federalist, No. 51’ (1787), in Ira C Lupu, ‘The Most-Cited Federalist Papers’, *Constitutional Commentary*, Vol. 15, Issue 3, (Fall 1998), University of Minnesota Law School.

<sup>25</sup> Eric Barendt, ‘Separation of Powers and Constitutional Government’, *PL* 599, 1995, at 599; Roger Masterman, *The Separation of Powers in the Contemporary Constitution*, Cambridge University Press, Cambridge, 2011, p. 16.

<sup>26</sup> See the introduction of the Supreme Court in the UK, ‘A clearer separation between those who make the law and those who administer it’ as remarked by Lord Phillip of Worth Matravers, Press Notice 01/09 ‘Supreme Court of the United Kingdom comes into existence’, 1 October 2009, retrieved 11 December 2011, [www.supremecourt.gov.uk/docs/pr\\_-0109\\_2\\_.pdf](http://www.supremecourt.gov.uk/docs/pr_-0109_2_.pdf); for debates in Australia see Andrew Bartlett Senator for Queensland, ‘Australian Democrats, Separation of Powers’, 25 March 2009, retrieved 8 February 2013, [http://www.democrats.org.au/docs/ActionPlans/PrimeMinister\\_SeparationPowers\\_2007.pdf](http://www.democrats.org.au/docs/ActionPlans/PrimeMinister_SeparationPowers_2007.pdf) Prime Minister & Cabinet; the United State Senate, [http://www.senate.gov/civics/constitution\\_item/constitution.htm](http://www.senate.gov/civics/constitution_item/constitution.htm).

rise of administrative power.<sup>27</sup> This section will discuss briefly how the executive has grown stronger than the legislature in modern states undermining constitutional ‘checks and balances’ and how the tripartite model cannot, by itself, effectively work to constrain the executive power as it had been ideally hoped for.

### **2.2.1 The separation of powers and the political party system**

Political parties are widely considered as essential to a modern representative democracy because they offer choices for the citizens to select among different ideas of how they want to be governed, as well as providing candidates the opportunity to participate in elections.<sup>28</sup> Nevertheless, the input of political parties can also result in another effect: the domination of the executive, that is, in modern party-based politics the executive branch can dominate and control the legislature. Along these lines, there is a large literature on the impact of political parties in relation to the inadequacy of the tripartite model as a constitutional design to safeguard the liberties of the citizen against tyranny and arbitrary use of power.<sup>29</sup>

Research has found that disciplined partisan support for political parties are a major factor in undermining the effective scrutiny of the executive by the legislature.<sup>30</sup> In parliamentary systems, the legislative branch can scrutinize the government by debates, through questions in parliament and the use of committee hearings. The executive branch or the government of the day cannot operate effectively without the support of the majority of the legislature. In this way, the separation of power between the executive and the legislature can help discipline an omnipotent legislature or executive. However, it is pointed out that this system requires appropriate checks and balances between the two branches to work effectively, which means there are conflicts of interest between the executive and the legislature, while agreement from both the two bodies is required for public policy.<sup>31</sup>

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<sup>27</sup> Eoin Carolan, *The New Separation of Powers: A Theory for the Modern State*, Oxford University Press, Oxford, 2009, p. 38.

<sup>28</sup> Wilhelm Hofmeister and Karsten Grabow, *Political Parties Functions and Organisation in Democratic Societies*, Konrad Adenauer Stiftung, Singapore, 2011, p. 256.

<sup>29</sup> For example, Martin Loughlin, *Foundations of Public Law*, Oxford University Press, Oxford, 2010, p. 397.

<sup>30</sup> Albrecht Morgenstern, ‘Separation of Powers and Party Politics- On the Value of Divided Government’, paper presented at the annual meeting of the American Political Science Association, Hilton Chicago and the Palmer House Hilton, Chicago, IL, 02 September, 2004, retrieved 12 December 2011, [http://www.allacademic.com/meta/p59277\\_index.html](http://www.allacademic.com/meta/p59277_index.html).

<sup>31</sup> Torsten Persson, Gérard Roland and Guido Tabellini, ‘Separation of Powers and Political Accountability’, *The Quarterly Journal of Economics*, 112 (4), 1997, 1163-1202.

However, in reality the government frequently has majority support in parliament and party discipline makes sure that legislators vote with their respective parties. As the governing party leader normally becomes head of the government, it is less likely that a member of the party will scrutinize his party leader as doing so might risk losing his chance of nomination for election or more severely lead to expulsion from the party. As a result, the concern is that ‘individual self-preservation leads most MPs to support the leadership through thick and thin’.<sup>32</sup> In addition, a majority government can adopt legislation which it needs for implementing its policy as voting on bills is largely controlled by the whip, while bills that lack support from the government are likely to fail. Consequently, the majority of bills adopted by parliament are initiated and sponsored by the executive. The executive dominance inevitably weakens the effective scrutiny of the executive by the legislative branch and undermines its effectiveness in performing its primary role as a legislative body.<sup>33</sup>

Party discipline and executive monopoly are common aspects of nearly all parliamentary systems that have adopted the Westminster style,<sup>34</sup> for example Australia,<sup>35</sup> Ireland,<sup>36</sup> India, Thailand<sup>37</sup> and Canada,<sup>38</sup> where strong majority governments face little challenge from the legislatures because of party discipline. Thailand provides a good illustration of the accountability problems that can result from an excessive reliance on Parliamentary democracy to deliver accountability. In Thailand, the opposition parliamentarians are seen as having little chance of winning a no-confidence vote because they lack a majority in the lower house, and party discipline ensures that the executive will get support from the controlling party. In fact, since the adoption of a democratic parliamentary system of government 79 years ago, many motions of no confidence have been lodged, but no government has been

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<sup>32</sup> Ackerman, n. 5, p. 646.

<sup>33</sup> According to Carol Harlow, there was in fact a considerable degree of consensus over growing executive and party domination of Parliament and the need for reform has been a recurrent theme since the 1970s, Carlow Harlow, ‘Back to basics: reinventing administrative law’, *P.L.* 1997, Sum, 245-261; Emlyn Capel Stewart Wade, and Christopher Forsyth, *Administrative Law*, Oxford University Press, Oxford, 2009, p. 764-5.

<sup>34</sup> Aaron M Stern, *Institutional Change in Legislatures: Thailand's House of Representative 1979-2002*, Thesis, the Degree of Doctor of Philosophy (Political Science), University of Michigan, 2006.

<sup>35</sup> Paul Craig, Adam Tomkins, *The Executive and Public Law: Power and Accountability in Comparative*, Oxford University Press, Oxford, 2005, p. 101.

<sup>36</sup> James P Casey, *Constitutional Law in Ireland*, 3<sup>rd</sup> edn., Round Hall, Dublin, 2000, p.231.

<sup>37</sup> The Constitution of Thailand B.E. 2550 (2007).

<sup>38</sup> Tripta Kanojia and Rachel Simeon, ‘Challenges to Executive Dominance in Intergovernmental Relations’, in John Kincaid and Rupak Chattopadhyay (eds.), *Policy Issues in Federalism: International Perspectives*, Unity in Diversity Learning from Each Other, Vol. 5, Forum of Federations, 2008, p. 125-147.

removed as a result of a confidence vote. In an attempt to address this situation, the 2007 Constitution, Section 122 prescribes:

Members of the House of Representatives and senators are representatives of the Thai people and free from any mandate, commitment or control, and shall honestly perform the duties for the common interests of the Thai people without conflict of interest.

Notwithstanding this constitutional provision, in the most recent vote of no confidence on 28<sup>th</sup> November 2011 against the Justice Minister Pracha Promnok, the Minister survived with a result that showed no sign of free vote, suggesting party discipline is still enforced strongly.

In a presidential system the separation between the legislature and the executive is more distinct, as the executive is not drawn from the legislature. Nevertheless, the US system of checks and balances can also be undermined by the influence of political parties which create alliances among public officeholders and therefore erode the boundaries between the legislative and executive branches.<sup>39</sup> Jackson observed that the rise of the party system has added extra power to the executive branch beyond what is granted to it by the constitution because ‘party loyalties and interest are sometimes more binding than the law’.<sup>40</sup> The President as a political leader can use his power to control the other branch effectively. Strong executives in the presidential system can happen even when the three institutions are not controlled by the same political party.

According to Ackerman,<sup>41</sup> when a legislative impasse occurs, one of the options that Presidents can use to get through the gridlock of impasse is using unilateral decrees to solve pressing problems; this power often exceeds their constitutional authority. However instead of protesting, representatives are relieved that they can get away from making hard political decisions. Succeeding presidents have used these precedents to expand their decree power further and the emerging practice following the decrees may even be codified by subsequent constitutional amendments. He concluded this cycle has already happened in countries like Argentina and Brazil, and to a lesser degree, in the United States, the homeland of presidentialism.

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<sup>39</sup> Daryl J Levinson and Richard H Pildes, ‘Separation of Parties not Powers’, 119 *Harvard Law Review* 2311, 2006, at 2324.

<sup>40</sup> *Youngstown*, 343 US 579, 1952, at 654.

<sup>41</sup> Ackerman, n. 5, p. 647.

Though the political party system tends to unite the politicians across the boundaries of the legislative and the executive institutions, executive dominance over the legislature is not absolute. The restraint of the executive branch can be effected through various restraining mechanisms upon government such as general elections, the existence of the opposition in parliament, and the scrutiny by the judiciary of decisions and acts of the executive authorities. However, judges in general have seemed reluctant to involve themselves too much in substantive policy and political issues, as they do not want to transgress in the areas that the doctrine of separation of powers defines as executive or legislative functions.

An illustration of the above phenomenon is a decision by the Thai Supreme Administrative Court in 2007. In the case the court rejected a petition filed by a Thai non-governmental organization (NGO) requesting it to issue an emergency order to halt the signing of a free-trade agreement (FTA) between Thailand and Japan. The reasoning of the court was that it did not have the authority to issue an emergency order blocking an act which was the exercise of executive power provided by the Constitution.<sup>42</sup>

There are additional limitations to the court's ability to act, such as that it will only adjudicate the legality of governmental actions when there is an actual case brought before it by disputing parties. Further, mechanisms responsible for bringing cases to the court, such as public prosecutors and the police, are under the executive's supervision and perceived as not as effective when dealing with their own high-ranking officials. An illustration of this problem can be seen in the United States, where the public lack of confidence in the ability of the executive branch in investigating the Watergate affair led Congress to pass an Ethics Act<sup>43</sup> to overcome public doubt by establishing an investigating office independent from the executive branch influence. Similarly in Thailand, the 2007 Constitution<sup>44</sup>, provided for the established Code of Ethics ensuring ethical standard of each kind of person holding political position or government official. The Constitution stipulated that violation or failure to comply with ethics standards by a government official or state official is deemed to be in breach of discipline and can lead to removal from office.

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<sup>42</sup> The Supreme Administration Court decision 198/2550.

<sup>43</sup> The Ethics in Government Act 1978.

<sup>44</sup> Chapter XIII on Ethics of Persons Holding Political Positions and State Officials, Section 279-80.



Executive dominance of the constitution has been widely observed as a major challenge that reduces the scope for transparency and accountability in the exercise of public authority because less scrutiny increases the risks of abuse and misuse of power.<sup>45</sup> Following these lines, there is much discussion in the recent literature on the deficiencies of the existing restraining mechanisms under the tripartite structure of the democratic constitutional framework. It is accepted that the separation of powers is essential in controlling the government but suggested that the existing mechanisms of the tripartite model may not be enough to effectively keep the exercise of public powers under control. Violations of human rights, abuses of authority by the holders of state power at all levels in many democratic countries are pointed out as a sign of weakness of the traditional mechanism.<sup>46</sup>

### **2.2.2 The growth of administrative agencies and administrative power**

The state faces many challenges that come with modernization such as pollution, uneven wealth distribution, child labour, public health and social order. Society's demand for governments to solve social and economic problems has led governments to take an active role as a regulator.<sup>47</sup> The function of governments in the twenty - first century has become geared more towards the realization of educative, disciplinary and regulatory goals rather than simply control of material resource.<sup>48</sup> In Asia this trend started in the mid-1990s, when the developmental state model gave way to a liberal regulatory model.<sup>49</sup> With expanded responsibility for improving the life of the citizen, the legitimate functions of government no longer rest on the eighteenth-century constitutional concept of limited government in which functions were largely confined to 'military, police and court'.<sup>50</sup> The minimal state intervention in personal liberties and economy has been abandoned; the modern state has accepted the necessity for intervention.<sup>51</sup>

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<sup>45</sup> Kanojia and Simeon, n. 38.

<sup>46</sup> Schedler et al., n. 7, p. 2, 334; Carolan, n. 27, p. 38.

<sup>47</sup> Rodney Barker, *Political Ideas in Modern Britain: In and After the Twentieth Century*, 2<sup>nd</sup> edn., Routledge, London 1997, p. 14-18.

<sup>48</sup> Loughlin, n. 29, p. 432.

<sup>49</sup> Tom Ginsburg, Albert H Y Chen (ed.), *Administrative Law and Governance in Asia*, Routledge, London, 2009, p. 2.

<sup>50</sup> Tom Lansford, *Political Systems of the World*, Marvell, Cavendish, 2007, p. 31-32; see also Loughlin, n. 29, p. 446.

<sup>51</sup> For example, Cecil T Carr, *Concerning English Administrative Law*, Oxford University Press, Oxford, 1941, pp. 10-11, cited in Carol Harlow, Richard Rawlings, *Law and Administration*, 3<sup>rd</sup> edn.,

The tasks of the modern state to improve the life of citizen through provision of services and regulation have brought large areas of daily life under legislation. A huge volume of legislative and regulatory documents shows how wide-ranging are the activities of the state in matters of welfare and public order. In response to the growth of its responsibilities, the executive branch in modern state has grown in size, structure and power compared to the eighteenth century.<sup>52</sup> However, owing to measures to reduce public expenditure, ideology, and a need to improve efficiency of public services, the trend has been partially reversed in recent years, with moves to extensive privatization and contracting out in some countries.<sup>53</sup> Even here though, the government still undertakes a considerable amount of regulation of social and economic affairs and solve public problem which become more complex.<sup>54</sup> Thus new state apparatus continue to be created. Public tasks nowadays are entrusted to a wide variety of administrative organs which are diverse in terms of structure from central government departments, regional and local authorities, to quasi-autonomous bodies such as state enterprises and regulatory agencies, and also to the private sector.<sup>55</sup>

This trend is mirrored in Thailand. In the early 1950s, influenced by Europe, there was a rapid expansion in the public sector, especially the establishment of state enterprises in various sectors such as energy, transportation (air, sea and land), banking

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Cambridge University Press, Cambridge, 2009, p. 1; Gary Lawson, 'The Rise and Rise of the Administrative State, Harvard Law Review', Vol. 107, No. 6, April, 1994, pp. 1231-1254.

<sup>52</sup> A dramatic example of the transformation of the executive apparatus can be seen in the United States of America. Today, the US executive branch consists of fifteen departments to cover large areas of state affairs and hundreds of federal agencies and corporations responsible for specific areas of the government, such as the Environmental Protection Agency and the US Postal Service, employing well over 3 million people. In England the entire civil service in 1832 accounted for approximately 21,000 civil servants. The implementation of a stream of government programs led to a steady growth in size and range of state activities which resulted in a large central government. Several new departments were established. The numbers of officials had risen to 50,000 by 1900 and by 1980 over half a million. See J Rank Articles, 'Executive Branch - Divisions of the Executive Branch - President, Agencies, Cabinet, and Department', retrieved 7 November 2011, <http://law.jrank.org/pages/6653/Executive-Branch-Divisions-Executive-Branch.html#ixzz1cCKaEL8P>; Peter Leyland, Terry Woods, Textbook on Administrative Law, 4<sup>th</sup> edn., Oxford University Press, Oxford, 2004, p. 12.

<sup>53</sup> However, owing to measures to reduce public expenditure, ideology, and a need to improve efficiency of public services, the trend has been partially reversed in recent years, with moves to extensive privatization and contracting out in some countries. John Bell, 'Administrative Law in a Comparative Perspective', in Esin Orucu, David Nelken (eds.), *Comparative Law A Handbook*, Hart Publishing, Oxford, 2007, p. 290.

<sup>54</sup> Peter Aucoin, 'Administrative Reform in Public Management: Paradigms, Principles, Paradox and Pendulums', *Governance*, 3, Issue 2, 1990, pp. 115-137; Loughlin, n. 29, p. 435; Tony Prosser, *The Regulatory Enterprise*, Oxford University Press, Oxford, 2010, pp. 1-21.

<sup>55</sup> There are different approach in treating the activities of private sector in provide services for public interest. The English and Dutch will treat such activities as commercial services operating under government supervisory power. On the contrary, the French would treat the private operators in providing public service as having been conferred with and exercising public powers, therefore public law applies; see Orucu, n. 54, p. 290.

and etc., of which the numbers amounted to 107 in 1961.<sup>56</sup> Though, the Thai government gradually privatized state enterprises from 1961 onwards,<sup>57</sup> the 2007 Constitution provided for more extensive list of basic rights and liberties<sup>58</sup> such as the right to standard public health services,<sup>59</sup> the right of the elderly (over 60 years of age) with insufficient income to receive aid from the State.<sup>60</sup> The fact that the Constitution locates all those items in a Chapter headed ‘Rights and Liberties of the Thai People’ means that all state organs are now bound to make, enforce and interpret laws to ensure that these social rights are realized. In the meantime the numbers of ministries has grown from twelve in 1892 to twenty at present.

According to Loughlin, the modern government no longer presents itself as a coercive institution that commands people but it organizes and regulates social relations.<sup>61</sup> Therefore while the despotic power of the sovereign has declined because of institutional constraints, there has emerged in the modern state a new kind of power exercised by public authorities on the people through regulatory measures or “administrative power”. Administrative power, exercised by thousands of officials to carry out legislation and policies, which encompasses all aspects of people’s day-to-day life, can affect people more than the operation of both the criminal and civil justice systems combined.<sup>62</sup>

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<sup>56</sup> Sakda Thanicul, ‘Regulatory Reform and Competitiveness in Thailand’, presented at the APEC Competition Policy and Economic Development Conference, jointly organized by Japan External Trade Organization (JETRO), Japan Economic Law Association, retrieved 15 December 2011, <http://www.thailawforum.com/articles/regulatory2.html>.

<sup>57</sup> The measure was taken because the country was facing capital investment problems and adopting an industrial strategy based on the private sector through the promulgation of the Corporatization Act 2542 B.E. (1999). See Nantawat Boramanand, *Privatization of the Thai State Enterprises*, Institute of Public Policy Studies, Bangkok, 2000.

<sup>58</sup> Most of them are what can be termed ‘social rights’.

<sup>59</sup> Section 51 A person shall enjoy an equal right to receive standard public health service, and the indigent shall have the right to receive free medical treatment from State’s infirmary. In effect, the Thai government led by Thaksin’s administration put this section into effect by implementing the ‘Treating All Diseases for 30 Baht’ Project.

<sup>60</sup> Section 53 A person who is over sixty years of age and has insufficient income for living shall have the right to welfare, public facilities and appropriate aids from State.

<sup>61</sup> Loughlin, n. 29, p. 432.

<sup>62</sup> In England and Wales, Administrative justice in 2010 compared with civil and criminal justice – hearings/trials: Administrative Justice: 650,000, Criminal Justice 223,000, Civil Justice (not Family) 63,000, from Administrative Justice and Tribunal Council, *Securing Fairness and Redress: Administrative Justice at Risk?*, October 2011, retrieved 7 November 2011, [http://www.justice.gov.uk/ajtc/docs/AJTC\\_at\\_risk\\_\(10.11\)\\_web.pdf](http://www.justice.gov.uk/ajtc/docs/AJTC_at_risk_(10.11)_web.pdf).; In Thailand there has been an increase in volume of cases received at a higher rate each year since the Administrative Court started operation in 2001. There were 963 cases in 2002 compared to 2,278 cases in 2010, an increase by 137 percent. As of 31<sup>st</sup> January 2011 the court received a total of 46,568 cases, *Matichon*, 3<sup>rd</sup> March 2011.

Administrative power involves the exercise of discretion. Discretionary power provides the capacity to choose courses of action, a flexibility which is essential for individualized justice and for creative justice for which legal rules cannot completely provide.<sup>63</sup> But discretionary power also creates possibilities for arbitrariness.<sup>64</sup> Though discretionary powers are not new in governance, the growth of state regulations, the complexity of contemporary society and the growing dependence on specialist, technical, scientific knowledge and expertise results in the extended reliance on discretionary powers. Besides, contemporary politicians and administrators tend to be of the opinion that, because administrative agencies have specialized knowledge and power to achieve the legislature's objectives, administrative discretionary power can be used by public officials, who have powers and duties to deliver services or enforce the rules, as an instrument to achieve social and economic policies.<sup>65</sup>

While administrative agencies are part of the executive branch, the autonomy of a significant amount of administrative bureaucracy based on their specialization has caused concern over the remoteness between the elected government minister and the actions of government administration. The dividing line between making policy and executing functions changes the nature of executive responsibility for the daily task of administrative agencies, even though in a parliamentary system ministers are supposed to remain in control of the performance and policy of the administration. Therefore, the focus is drawn towards how to make public authorities accountable toward citizens.<sup>66</sup>

The Thai administrative system is influenced by ideas from its former British colonial administration.<sup>67</sup> But due to a different political and cultural environment it has gained some distinctiveness.<sup>68</sup> First the Thai bureaucracy is powerful,<sup>69</sup> partly

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<sup>63</sup> Albert V Dicey, *The Law of the Constitution*, Macmillan, London, 1961, p. 188.

<sup>64</sup> Kenneth C Davis, *Discretionary Justice: A Preliminary Inquiry*, Louisiana State University Press, Baton Rouge, 1969, pp. 216-7.

<sup>65</sup> Otherwise administrative agencies will be criticized for being unresponsive to political and program initiatives, see 'Traditional Responses to American Administrative Abuse', in Douglas Shumavon and Kenneth Hibbeln, (eds.), *Administrative Discretion and Public Policy Implementation*, Praeger, New York, 1986, p. 211-232.

<sup>66</sup> Loughlin, n. 29, p. 447.

<sup>67</sup> John Girling, *Thailand: Society and Politics*, 6<sup>th</sup> edn., Ithaca: Cornell University Press, New York, 1981, p. 46.

<sup>68</sup> Andrew Harding and Peter Leyland, *The Constitutional System of Thailand: A Contextual Analysis*, Hart Publishing, Oxford, 2011, p. 95.

<sup>69</sup> See Fred W Riggs, *Thailand: The Modernization of a Bureaucratic Polity*, East-West Center Press, Honolulu, Hawaii, 1966. It is said that Thaksin's one objective of administrative reform was to reshape the Thai bureaucratic culture so as to subdue the power of Thai bureaucrats. See Harding and Leyland, n. 68, pp. 97-100.

because it possesses expertise while governments have been short-lived. A lack of continuation in policy has been evident due to a lack of democratic continuity of government has been broken several times by the trend towards military coups. Therefore in Thailand a reliance is placed on the administration's knowledge and expertise. Secondly there is a financial relationship between the public administration and private entrepreneurs in such a way that existing legal and constitutional constraints to protect public interest have to be reassessed.<sup>70</sup> It therefore can be seen that the discussion above with regard to the growth of government administration and its power is particularly valid in Thailand.

### **2.2.3 Limitations of traditional institutional control over administrative power**

Administrative power can be considered legitimate because it is deployed to further the principle of liberties and equality for all.<sup>71</sup> Administrative law is concerned with the control of the discretionary power of public administration and with finding ways and means of controlling administrative discretion.<sup>72</sup> This entails subjecting the exercise of administrative power by public officials to review and there are a variety of means available by which this can be achieved.

Internal review of public officials' administrative decision-making can be secured by the intervention of their superiors who usually are entitled of their own motion to reverse, modify, substitute or annul the decision. In this capacity superiors can review both the merit and the legality of decisions and can impose disciplinary measures.

In some jurisdictions, where an internal appeal procedure for administrative disputes is provided for, an aggrieved individual can challenge the administrative decisions affecting his rights and interest by way of appealing to the superiors, or in some cases appealing to administrative tribunals where the merit and legality of the decisions can be checked. However, the ability of such mechanisms to secure justice

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<sup>70</sup> Harding and Leyland, n. 68, p. 95.

<sup>71</sup> Loughlin, n. 29, pp. 432-3.

<sup>72</sup> *id.*, pp 398-9.

is compromised where there are doubts over the impartiality and independence of such forms of internal control.<sup>73</sup>

Available forms of external control by independent machineries include scrutiny by the legislature and judicial review by a court of law. In many parliamentary systems, an aggrieved person can also write to an MP for representation. Though the legislature is the traditional body for people to air their grievances, it can be argued that political redress is uncertain and parliamentary procedures are probably not a suitable avenue for impartial fact finding because of political considerations, such as the interest of the government of the day.<sup>74</sup> Political considerations can have such an effect that the personal element of an individual case may have been overlooked and a satisfactory remedy for the complainant is not followed, even if his case is debated.<sup>75</sup>

The court is trusted for its judicial independence and ordinarily said to be the most effective means of redress, as no administrative action can be taken in the same case in contradiction to the court's decision. But the expense, lengthy and complicated procedure involved in judicial cases can deter aggrieved people from pursuing their complaints by this means. The fact that legal precision is essential in court could make the length of a trial difficult to predict. Thus, in terms of the numbers of cases handled and direct redress provided, judicial review is arguably not the most effective way to provide an effective check on administrative decision making.<sup>76</sup> In Thailand, this tendency is reflected in an old saying that 'it is better to eat dog dung than to go to the court'. Nonetheless, the availability of judicial review may have a very strong beneficial impact in making public officials more compliant with the law when making administrative decisions.

While the courts have demonstrated their ability to intervene for the protection of the citizen, judicial review by ordinary courts or administrative courts is usually concerned with legality not merit. The courts normally do not revise the

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<sup>73</sup> Sir Adrian Webb, *Review of Tribunals Operating in Wales*, the Stationery Office Limited, 2010, p.1, retrieved 12 May 2013, [http://ajtc.justice.gov.uk/docs/RTOW\\_English\\_t.pdf](http://ajtc.justice.gov.uk/docs/RTOW_English_t.pdf).

<sup>74</sup> Emlyn Capel, Stewart Wade and G Godfrey Phillips, *Constitutional and Administrative Law*, 9<sup>th</sup> edn., Longman, London, 1977, p. 651.

<sup>75</sup> John Francis Garner, *Administrative Law*, 4<sup>th</sup> edn., Butterworth, London, 1974, p.97.

<sup>76</sup> In the UK for instance, see the following statistics from House of Common Library: Table 1-3 stated that there were 5,382 applications for judicial review in England and Wales (which is very small compared with the number of questionable administrative actions)but out of these numbers only 733 cases were granted permission (14 % of applications), 281 cases were actually heard, and of these 118 were allowed (only 2 % of applications), cited in M Adler, 'Understanding and Analysing Administrative Justice', in M Adler (ed.), *Administrative Justice In Context*, Hart Publishing, Cornwall, 2010, p.143.



reasonableness or the wisdom of the decision, as doing so the court is deemed to substitute their discretion on the matters for that of the specialized administrators or to supervise the administrative decisions, which is not the role of the court.<sup>77</sup> This end result mirrors similar restrictions placed on judicial review elsewhere.

Besides, there are other cases that tend to fall out of the court's jurisdiction as injustice does not always amount to unlawfulness. It is reported that sometimes aggrieved persons, who have no legal right to take legal action have difficulties in seeking redress, which can go beyond mere financial compensation.<sup>78</sup> Therefore, it occurs frequently that a citizen will have a grievance for which no judicial remedy exists. For instance, a case where a public official fails to act according to proper standards of administrative conduct or maladministration is in many countries excluded from the court's jurisdiction.<sup>79</sup>

To summarise, the lack of effective control by the traditional institutions under the constitution, particularly in the context of 21<sup>st</sup> century administrative functions and powers, raises concerns about the ability of the constitution to adequately protect individual liberties and expectations of modern government. Such concerns have resulted in the development of new concepts and mechanisms, such as the concept of good administration and the creation of independent "accountability institutions" to protect the rights of the individual. It is these latter developments that are explored next.

## **2.3 Good governance and additional machinery**

One of the arguments for the necessity of implementing the concept of good governance in public service raised by international development organizations, such as the World Bank, United Nation Development Programme, or Asian Development Bank, is that the enormous expansion of the size and scope of activities of welfare states in different countries has not always resulted in meeting people's needs.<sup>80</sup> While

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<sup>77</sup> Banjerd Singkaneti, *Control over Administration*, Vinyuchon, Bangkok, 2008, p. 172.

<sup>78</sup> See Anne-Maree Farrell, Sarah Devaney and Amber Dar, *No-Fault Compensation Schemes for Medical Injury: A Review*, Interim Report to the No Fault Compensation Review Group, Scotland, Scottish Government Social Research, 2010, retrieved 7 November 2011, <http://www.scotland.gov.uk/Resource/Doc/924/0099427.pdf>.

<sup>79</sup> Mary Seneviratne, *Ombudsman Public Services and Administrative Justice*, Butterworth, London, 2002, p. 33.

<sup>80</sup> World Bank, *Public Service Yearbook*, Revisiting Good Governance, 2005/2006, p.3, retrieved 7 November 2011, <http://www.tni.org/sites/www.tni.org/archives/books/yearb05govern.pdf>.

there is no single definition of the concept of good governance, the term has been used in academic literature and by international organisations to refer to the standard whereby public institutions conduct public affairs, manage public resources in a manner essentially free of abuse and corruption, and with due regard for transparency, responsibility, accountability, participation, responsiveness (to the needs of the people); and rule of law.<sup>81</sup> As such, the concept of good governance calls for both legality and quality in public administration. Since the 1980s, trends in governments around the world have been towards improving the performance of the public sector.<sup>82</sup> Government officials are not only required to adhere to law in conducting public affairs but the concept of good governance must be observed.

In response to this challenge, many Asian government departments have introduced a stream of measures and guidelines for their staff to improve efficiency and quality in the performance of their public duties. For example, good practice guides have been produced.<sup>83</sup> Administrative law is aimed to provide good administrative practice.<sup>84</sup> Good administration is aimed at improving the quality of decision making and practice in the administrative process of public bodies. This does not mean that the law cannot be enforced to promote good administration, as the ultimate goal of administrative law is to provide good administrative practice.<sup>85</sup> Evidence to support this claim is that administrative law prescribes the aspects of decision making procedure to be followed by public officials. Decision making in contradiction to the procedure prescribed by law may be annulled by the court. But good administration is concerned with issues that cannot easily captured by legislation, such as providing customer-focused public services;<sup>86</sup> and the performance of public

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<sup>81</sup>Thomas G. Weiss, 'Governance, Good Governance and Global Governance: Conceptual and Actual Challenges', *Third World Quarterly* 21, no. 5/2000: 795-814; UN ESCAP, retrieved 4 October 2011, <http://www.unescap.org/pdd/prs/ProjectActivities/Ongoing/gg/governance.asp>.

<sup>82</sup> Such as modernizing public sectors by New Public Management (NPM) which according to Dunleavy has reached its peak and now the trend has moved on to the digital era governance, see Patrick Dunleavy, Helen Margetts, 'New Public Management is Dead: Long Live Digital Era Governance', *Journal of Public Administration Research and Theory*, July 2006; see also Harlow and Rawlings, n. 52, Chapter 2.

<sup>83</sup>For example Thailand enacted the Royal Decree on Criteria and Procedures for Good Governance 2546 B.E. (2003).

<sup>84</sup> Beatson et al., cited in Buck et al., n. 8, p. 32.

<sup>85</sup> Buck et al., n. 8, p. 32.

<sup>86</sup> id., pp. 31-2.

bodies are to be judged by the extent to which they satisfy the people for whom public services are provided.<sup>87</sup>

Good administration is one of the strategies of the Thai government's recent political and administrative reform which has the ultimate goal of making the political and administrative system more efficient in responding to the needs of the people, for example the promulgation of the Royal Decree on Good Governance (2003) and the Organization of State Administration Act (No. 5) B.E. 2545 (2002).<sup>88</sup> The 2007 Constitution, Section 74, requires government officials to act in compliance with the law in order to protect public interests, and provide to the public convenience and services in accordance with the principle of good public administration. Section 78 sets out the state administration policy, which includes encouraging state agencies to apply the principle of good public administration in the performance of their official duties.

### **2.3.1 Ombudsman**

Together with the developments above, in many countries new 'accountability institutions' have been created, including the ombudsman;<sup>89</sup> this movement is often cited as a response to the eroding public trust in politicians and political institutions and the deficiencies of traditional control by the legislature and the courts in protecting and defending people who are affected by administrative actions.<sup>90</sup> As described above, in liberal democratic nations the control of the exercise of public power has traditionally been focused on the legality or the lawfulness of governmental acts, a goal which is established on the fundamental principle of the rule of law. Therefore the controlling mechanism as well as procedure has tended to emphasise the legality check provided by the courts or other independent bodies, such as Corruption Commissions, Auditor Generals and Human Rights Commissions.

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<sup>87</sup> This is the result of the application of market model to public delivery which brings new ideology to public administration see Robert D Behn, *Rethinking Democratic Accountability*, Brookings Institution, Washington DC, 2001, cited in Janet M. Kelly, The Dilemma of the Unsatisfied Customer in a Market Model of Public Administration, *Public Administration Review*, 65(1): 76-84, 2005, p. 1.

<sup>88</sup> Section 3/1 para 4.

<sup>89</sup> See Ackerman, n. 5; O' Donnell, 'The New Separation of Powers', in Schedler et al., n. 7, pp. 20-51.

<sup>90</sup> Buck et al., n. 8, p. 29.

Common experiences worldwide, however, have shown that requiring governments to act lawfully is not, by itself, adequate, as in many cases government agencies, in performing their duties, act in accordance with law but still deliver results that can lead to significant injustice or unfairness. However, this is not because state actions in modern government are intended to be oppressive. Rather, in most situations bureaucracies have to respond to the demand for public services by individuals. Unfairness therefore is not normally a result of ill will, but, because of the complexity of the tasks assumed by public administration, there are errors that lead to confusion, unreasonable delay, misleading advice, loss of documents or mistakes in calculations, which in most cases are due to human errors, or sometimes there are shortcomings in the procedure by which the administrative decisions are made. This can cause feeling of indignation, distress or loss of opportunity and in many cases there will be financial loss.<sup>91</sup>

One consequence of this realisation has been an effort to create new institutions that can scrutinize and eradicate forms of unfairness insufficiently captured by legal definitions, and thereby secure good governance in public administration. In this respect, it is widely accepted today that the ombudsman is capable of being a facilitator of good governance and the institution is promoted on its effectiveness in securing high standards of conduct of public officials, with the result is that it has become an almost permanent part of most constitutions.<sup>92</sup>

The 1997 Constitution represented the outcome of efforts to reform political and government administration. It is underpinned by the need to improve transparency and efficiency, and strengthen the accountability of government and administration. It required that seven related laws were passed, for example, the Official Information Act in 1997 provides greater access to official information, prescribing that, in principle, all official information must be publicly available with clear and limited number of exceptions. The 1997 Constitution also required for the first time the establishment of seven ‘accountability institutions’, namely the Administrative Court, the Constitution Court, the National Election Commission, the National Human Rights Commission, the State Audit Commission, the National Counter Corruption

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<sup>91</sup> Seneviratne, n. 79, p. 51.

<sup>92</sup> PASC 2007, ‘Work of the Ombudsman’, Oral Evidence given by Ann Abraham, Parliamentary and Health Service Ombudsman, HC 1086-1, session 2007-8, 18 October 2007, The Stationery Office, London.

Commission and the Ombudsman, in order to strengthen the Constitution's 'checks and balances' and administrative decision-making.

The Ombudsman of Thailand, designated as 'the Ombudsman for National Assembly', was established with an expectation that it will be both an alternative means to solve peoples' grievances caused by administrative injustice and as a legislative mechanism to provide a check on public administration with a focus on fair and appropriate use of public power.

## **2.4 Constitution building in developing countries**

In the course of the last two centuries a set of western modern political and legal practices - including elements such as the rule of law, human rights, the separation of powers, political checks and balances, civil liberties, a written constitution, review of the constitutionality of governmental actions - has spread to all corners of the earth as after WWII decolonisation led to a flurry of state-building all over the developing world.<sup>93</sup> As Fukuyama observed, 'the mission of modern politics is to tame the power of the state, and to direct state activities towards what is regarded as legitimate by the people it serves, and to subject the exercise of state power to the rule of law'.<sup>94</sup> However, while it is argued that modern state and liberal democratic constitutionalism in its Western form may be regarded as having universal appeal and application far beyond the Western nations in which it originated; there is a concern that it is implemented in name only in many other parts of Africa, Asia and the Middle East.<sup>95</sup>

As the ombudsman schemes have been adopted widely in developing countries over this period, the wider concern about the transplant of Western Constitutionalism is relevant to this thesis. Pertinent to this issue is that the occasional tendency to regard

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<sup>93</sup> The global expansion of democracy in the last quarter of the twentieth century was described by Samuel Huntington as the 'third wave' of democratisation. See generally Samuel P Huntington, *the Third Wave: democratisation in the Late Twentieth Century*, University of Oklahoma Press, 1993; Bruce Ackerman, *the Future of Liberal Revolution*, Yale University Press, New Haven, CT 1992; Mary Kaldor & Ivan Vejvoda (eds.), *Democratization in Central and Eastern Europe*, Continuum, London, 2002; Ian Jeffries, *the Countries of the Former Soviet Union at the Turn of the Twenty-First Century*, Routledge, London and New York, 2004; Wen-Chen Chang, 'The Emergence of East Asia Constitutionalism: Features in Comparison', *American Journal of Comparative Law*, Vol. 59, 2011, p. 805.

<sup>94</sup> Francis Fukuyama, *State-Building: State Governance and World Order in the 21st Century*, Cornell University Press, New York, 2004, p.1.

<sup>95</sup> Marc F Plattner, 'the End of Transitional Era', *Journal of Democracy*, Volume 25, Number 3, July 2014.

the ombudsman as part of the democratic product and one which can usually only function properly in a liberal democratic environment.<sup>96</sup> This problem is particularly relevant in this study because Thailand is a new democracy that has adopted the ombudsman concept, partly due to the influence of western advocates of the institution. But the quality of the democracy in Thailand has been questioned due to the regular occurrence of military coups.

To address this issue, in this section, therefore, I propose to begin by acknowledging the difference in the political context that informs the work of the ombudsman in developing countries. This Chapter first presents the constitutional development in Asia, then addresses concerns the implication of the different political contexts in developing countries on the effectiveness of the ombudsman. To evaluate these concerns, reference is made to the actual work of ombudsmen in developing countries and an argument is made that actual experience in many developing countries indicates that an ombudsman scheme can be effective, even in less favourable environments. The discussion then proceeds to focus on the constitutional weaknesses in Thailand (the Thai context is discussed in more details in Chapter 5). This section concludes by contending that imperfections of ombudsman schemes in developing countries, such as the Thai Ombudsman, do not necessarily follow from operating in a country where democratic and/or rule of law arrangements remain relatively new and unstable. Instead, as this thesis will demonstrate, the problems associated with an ombudsman scheme still need to be situated within an analysis of the particular design and its fit within the overall constitutional set-up.

### **2.4.1 Constitutionalism in Asia**

A democratic wave has swept across globe since the early to mid-1980s, partly as a result of the superior technological, military, and economic power of the West.

<sup>97</sup> Southeast Asia is no exception. Since 1993 exercises in constitutional reform have

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<sup>96</sup> P Nikiforos Diamandouros, 'Human rights and non-judicial remedies - the European Ombudsman's perspective', speech at the London School of Economics and Political Science, London, 30 November, 2005.

<sup>97</sup> Huntington, n. 93. The transplantation of Western ideas and practices of constitutionalism to Asia occurred, in some cases, in the course of colonisation (for example in India), and in others by voluntary and conscious importation or imitation as an Asian society sought to modernize itself when confronted by the challenges posed by the West (for example in China and Japan).

been undertaken in a large number of Asian states.<sup>98</sup> This reform process has included the transplant of constitutionalism and ‘western’ constitutional practices to Asia. Even those countries that were not colonized, such as Thailand and Meiji era Japan, have tended to adopt Western legal forms prophylactically, as part of an effort to retain independence. A key part of the process has been that the basic framework for liberal constitutional democracies in legal terms has been provided by a state's constitution, as part of the current trends in governance and legal development aimed at establishing a modern, efficient and internationally harmonised system of safeguards of human rights and civil liberties.<sup>99</sup>

In the initial scholarship about constitutional building in developing countries, there has been a tendency in the west to presume that Asian political and legal traditions may not be comparable to western constitutional democracies, thus creating doubt as to whether direct institutional transplants could be successful.<sup>100</sup> In such analyses various inhibiting factors for full civilian rule are identified. Thus the experience of liberal democracy in Asia is associated with instability,<sup>101</sup> governments dominated by the strength of the military, legacies of the struggle for independence, the existence of various justifications for the suppression of free speech,<sup>102</sup> and instances of changes of government being affected by coup rather than through constitutional processes.<sup>103</sup> Further proponents of the so-called Asian values<sup>104</sup> offer a

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<sup>98</sup> Cheryl Saunders, ‘Towards a Global Constitutional Gene Pool’, 4 *National Taiwan University Law Review*, 2, 2009, at 17. The first big wave of constitution making occurred around the end of World War II with constitutions adopted in Thailand, the only state in the region that was never colonised, with the first having been adopted in 1932, Indonesia (1945/1949/1950), North Vietnam (1946), Burma, Cambodia and Laos (1947) and Malaya (subsequently Malaysia) in 1957. Singapore and Brunei transformed pre-independence autonomy constitutions into sovereign state constitutions in 1965 and 1984 respectively. In August 1995 Sri Lanka initiated constitutional changes based on federal principles, divesting the central government of a range of powers and establishing a clearer division of powers between the centre and the regions. Myanmar's Constitutional Convention has met periodically since early in 1993.

<sup>99</sup> Fukuyama, n. 94.

<sup>100</sup> For example, in his later study on the Third Wave of democratization, Huntington still held that ‘conceivably Islamic and Confucian cultures pose insuperable obstacles to democratic development’.

<sup>101</sup> Graham Hassall & Sean Cooney, ‘Democracy and Constitutional Change in Asia’, *Asian Studies Review*, 1993, 17:1.

<sup>102</sup> For example, the ‘development first’ argument, presented by Singapore over many years, was based on the assumption that ‘Western’ constitutional values, such as individual freedoms and a pluralistic political system, would hinder economic development.

<sup>103</sup> Hassall & Cooney, n. 103.

<sup>104</sup> Singapore, Malaysia and Indonesia were the main proponents of Asian values. However Asian values have later mutated into ‘Singapore exceptionalism’ idea in the period before the Asian Crisis in 1997, see Laurence Wai-Teng Leong, ‘From “Asian Values” to Singapore Exceptionalism’, in L. Avonius & D. Kingsbury (eds.), *Human Rights in Asia: A Reassessment of the Asian Values Debate*, Palgrave Macmillan, Hampshire, 2008, pp. 121-240; Kevin YL Tan, ‘State and Institution Building through the Singapore Constitution’, in Thio Li-ann & Kevin YL Tan (ed.), *The Evolution of a*

discourse which is incompatible with liberal and democratic constitutionalism.<sup>105</sup> For example it is sometimes argued that Asian societies favour authority over liberty, emphasize duties over rights, and place community above individuals. Therefore, it is often viewed that the attempts to impose western theories and institutions of constitutionalism in the course of the last two centuries have often failed and that constitutionalism has a reputation as a legal gloss for authoritarian rule, despite successful democratic development in countries such as Japan, Taiwan and South Korea.<sup>106</sup>

However, subsequent scholarship on the state of constitutionalism in Asia in the early twenty-first century, on the contrary, argues that there is now considerable evidence of its positive reception, albeit that constitutionalism comparatively is not practiced identically to equivalent arrangements in the West.<sup>107</sup> Such convergence includes the need for constitutional control through judicial review as well as the establishment of the Constitutional Courts in some Asian countries (e.g. in Thailand and Indonesia). Further, in a significant number of Asian countries since the late nineteenth century, demonstrable convergence frequently includes the need for a dispute resolution mechanism of some other kind to the judiciary.<sup>108</sup> There is also evident convergence of constitutional principles at the highest level of generality: democracy, the rule of law, separation of powers, judicial independence, human rights protection and constitutionalism.<sup>109</sup>

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*Revolution: Forty Years of the Singapore Constitution*, RoutledgeCurzon, London, 2009, pp. 50-78; Yvonne Tew, 'Beyond "Asian Values": Rethinking Rights', CGHR Working Paper 5, Nov. 2012, University of Cambridge Centre of Governance and Human Rights, Cambridge.

<sup>105</sup> Transcript of an interview with Lee, see Fareed Zakaria, 'Culture Is Destiny: A Conversation with Lee Kuan Yew', 73, *Foreign Aff.* 1994, 109, 111. Lee argued that 'the East places emphasis on a well-ordered society and only with such a society will everyone have maximum enjoyment of freedom'. For a detailed review of the Asian Value debate, see Karen Engle, 'Culture and Human Rights: The Asian Values Debate in Context', 32 *N.Y.U. J. Int'l L. & POL.* 291, 2000. For discussion on 'Three essential characteristics of Asian Values', see Scott L Goodroad, 'The Challenge of Free Speech: Asian Values v. Unfettered Free Speech, An Analysis of Singapore and Malaysia in the Global Order', 9, *Ind. Intl & Comp L Rev*, 1998, 259, 261.

<sup>106</sup> Post-war Japan, South Korea and Taiwan after they embarked on democratisation in the 1980s were generally recognized as political systems in East Asia that resemble Western liberal democracies. See Albert H Y Chen, 'Constitutions, Constitutional Practice and Constitutionalism in East Asia', December 24, 2014, Routledge Handbook of Asian Law, Forthcoming; University of Hong Kong Faculty of Law Research Paper No. 2014/04, retrieved 21 May 2015, at <http://dx.doi.org/10.2139/ssrn.2542528>.

<sup>107</sup> Clauspeter Hill, Jörg Menzel, 'Preface' in Clauspeter Hill, Jörg Menzel (eds.), *Constitutionalism in Southeast Asia*, Konrad-Adenauer-Stiftung, Singapore, 2009. Many authors are of the view that North Korea's constitution remains a classic "sham" constitution, but might be said to be accurate in that it describes itself as a dictatorship.

<sup>108</sup> *ibid.*, pp. 75, 243.

<sup>109</sup> Southeast Asian states have agreed on a Charter for the Association of Southeast Asian Nations (ASEAN).



Therefore, at present, though originating from Western modernity, constitutionalism has moved beyond transplantation in Asian soils and grown up considerably in its own distinct ways.<sup>110</sup> The end solution is uneven, partly because the degree of democratisation varies across Asia, with there existing well-developed democracies;<sup>111</sup> new, fragile, unstable or low-quality democracies;<sup>112</sup> and what might be termed semi democracies.<sup>113</sup> It should not, therefore, be expected that emerging democracies will achieve the same progress in a few decades. But there is no necessary obstacle to constitutionalism in Asia. Recent studies have argued that the claim that some of the key cultural traits of Southeast Asia, as witnessed by its early history, ever obstructed actual constitutional transformation towards western concepts of liberal democracy, are overstated. By contrast, there is evidence that whether constitutionalism eventually triumphs in a particular jurisdiction is determined more by politics and the contingency of historical events, such as wars and foreign interventions, than by culture and values.<sup>114</sup> Constitution building in the context of Asian developing countries could be considered still in its infancy. Indeed, progressing in terms of constitutionalism in developing countries may not be easy, but there is little evidence that these difficulties are due to an unfavourable tradition towards democratic political culture, as had been argued previously.

#### **2.4.1 The constitutional challenges in Thailand**

With regard to its transformation to liberal democracy, Thailand, like other Asian neighbours, also has to confront a number of serious obstacles. While this study identifies various factors and related issues in the constitutional landscape of emerging democracy that would normally make the performance of the Thai Ombudsman institution difficult and problematic (see Chapter 5 for more details on the Thai

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<sup>110</sup> Jiunn-Rong & Wen-Chen Chang, 'the Emergence of East Asian Constitutionalism: Features in Comparison', 59 *Am. J. Comp. L.* 2011, 805.

<sup>111</sup> Japan, South Korea, Taiwan.

<sup>112</sup> The Philippines, Thailand and Indonesia.

<sup>113</sup> Singapore and Malaysia.

<sup>114</sup> The perceived Asian value of 'state before self' notwithstanding has been counter-argued by the fact that East Asian constitutional developments have been focused on constraining government power, protecting individual rights (especially of women and children) and have given a voice to a vibrant civil society. Judicial statements in individual rights cases did not elevate collective values or public morality over civil and political rights. To the contrary, the three courts and especially the two constitutional courts in South Korea and Taiwan, had no hesitation to prioritize rights of individuals over collective morals or values, see Jiunn-Rong & Wen-Chen Chang, n. 114.

context), it also argues that the impact of these problems should not be overstated in terms of their capacity to obstruct the operation of the Thai Ombudsman.

### **Concerns that the overseeing power of the military renders the Constitution ineffective**

Ever since the establishment of parliamentary democracy in 1932, Thailand has experienced chronic political instability as constitutional governments have been periodically and routinely dismantled by military coups. This tendency is similar to the situation in many developing countries, as the military are often the dominant power group in the country. Their dominance is not complete, however, because of divisions within the military and the opposition of other forces within the society. It can also be argued that the military do not want complete dominance,<sup>115</sup> and that even though coups do still occur regularly, in a country such as Thailand one can identify a steady downgrading of the intervention of the military.<sup>116</sup> This is because of divisions within the military and the opposition of other forces within the society which attempt to push the military out of politics.<sup>117</sup> Also the military can no longer so easily justify the necessity of authoritarian rule, as the nation's sovereignty is no longer under threat from neighbours as before.

The strengthened role of political parties and parliament, a fast economic growth rate over the past two decades, and changes in public attitude, which has become more favourable to democratic, civilian rule, can also be claimed to have reduced the military's influence.<sup>118</sup> The nation's high economic growth rates<sup>119</sup> have led to a more sophisticated and educated populace that is determined to retain stability and democracy.<sup>120</sup> The military are not in a position to dominate a more sophisticated and educated populace, as they have dominated groups in the past. Indeed, despite

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<sup>115</sup> James Elliott, 'Towards Parliamentary Democracy in the Third World: the Case of Thailand', *Parliamentary Affairs*, Mar 1984, Vol.37, 220.

<sup>116</sup> Ji Ungpakorn, 'The Political Economy of Class Struggle in Modern Thailand', *Historical Materialism*, Jul 2001, Issue 8, pp. 162-5.

<sup>117</sup> It started with the strong prodemocracy movement in 1992.

<sup>118</sup> Clark Neher, 'Democratization in Thailand', *Asian Affairs: An American Review*, 1994, 21:4, p.197; Kai Jäger, 'Why did Thailand's middle class turn against a democratically elected government? The information-gap hypotheses', *Democratization*, December, 2012, Vol. 19, No. 6, pp.1138– 1165.

<sup>119</sup> GDP has been growing at an average rate of 7 - 8 per cent per annum, and even the 4.5 per cent in 1982 compared favourably to other countries during the economic recession, see Neher, n. 120, p. 205.

<sup>120</sup> Jäger, n. 126.

frequent military interventions, the democratization process of Thailand has been hailed as one of the most promising in all South-East Asia.<sup>121</sup>

### **Concerns that the political process is still very young and weak**

The traditions of elections, campaigning, accountability, civil liberties, and the other attributes of modern democracy in new democracies have been said to be young and weak and vulnerable to attack from non-democratic institution, such as the military. Likewise in Thailand, while the democracy development has shown some progress, recent widespread civil unrest and a recent military coup has disrupted a once such a promising democracy and have led to a more pessimistic outlook.<sup>122</sup> An additional problem that usually exists in a new democracy is, therefore, a weak system of the rule of law. But this section argues that, despite the concerns that the Thai democratic political process is young and weak, there is not much evidence that the rule of law has been improperly disrespected. This result can arguably be attributed to an effective administration, legislature and the judiciary, as well as a generally favourable governance environment in the Thai society. (This argument is referred to again in Chapter 9, in analysing the operation of the Thai Ombudsman.)

While the normal features of democracy, such as elections, campaigning, accountability and civil liberties, in Thailand may remain weak, there remain some institutions in the Thai governance which still perform better, such as the administration and the legislature and the judiciary. According to Worldwide Governance Indicators, Thailand's performance on the measures of 'Government Effectiveness' and 'Regulatory Quality' measured by the World Bank is very positive which means Thailand's overall levels of state capacity are quite high for developing countries.<sup>123</sup> This is because, as argued by Neher, the Thai bureaucracy is professionalised and differentiated, an outcome which has resulted from a 'relatively

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<sup>121</sup> Pasuk Phongpaichit & Chris Baker, 'Thailand: Fighting over Democracy', *Economic and Political Weekly*, 2008, Vol. 43, No. 50, Dec. pp. 13 - 19.

<sup>122</sup> *ibid.*

<sup>123</sup> Ranging from 0.07 in 2000 to 0.45 in 2005-higher than neighbors such as the Philippines, Indonesia and Vietnam, retrieved 21 May 2015, at <http://info.worldbank.org/governance/wgi/pdf/c213.pdf>; and at <http://www.investphilippines.info/arangkada/competitiveness/worldwide-governance-indicators/>; Government Effectiveness (GE) – capturing perceptions of the quality of public services, the quality of the civil service and the degree of its independence from political pressures, the quality of policy formulation and implementation, and the credibility of the government's commitment to such policies. Regulatory Quality (RQ) – capturing perceptions of the ability of the government to formulate and implement sound policies and regulations that permit and promote private sector development, retrieved 21 May 2015, at <http://info.worldbank.org/governance/wgi/index.aspx#faq>.

organic and largely home grown process of state formation and development, launched in the mid-nineteenth century'.<sup>124</sup> Besides the country's parliament and government are capable of producing high-quality legislation and of implementing government policies throughout the national territory. Further, Thailand does have a modern justice system distinguished by relatively high levels of institutionalization and a moderate degree of efficiency. A recent survey by the Asia Foundation confirmed that the judiciary is considered by the public to enjoy the highest degree of integrity and impartiality.<sup>125</sup>

In terms of social and cultural context, Thai society provides a fairly favourable environment for the rule of law and democracy. While demonstrations are also common in Bangkok, Thai traditional values have helped to stop governments from remaining unduly repressive and closed, and have aimed at reconciliation and consensus. Even the coup d'états that occur in Thailand are not the full affront to democracy and the rule of law that they may at first sight seem. Csernatonni pointed out that coup d'états in Thailand should not be described as a fully-fledged coup d'état, but rather fall into the category of a military-type intervention, through which the military usually hands back political power to civilian politicians in a relatively short period of time.<sup>126</sup> In Thailand coups are a widely accepted political act and a traditional form of power seizure in the Thai society, with the coups themselves usually bloodless. It also should be noted that the transition to democracy has not been as dramatic as in those nations where the ideological path has been longer. Thus an underlying social stability and consensus has allowed continued economic growth despite military coups and frequent political turmoil. Economic and social development has reached a level in Thailand where parliamentary democracy can be firmly established.<sup>127</sup> Since 1933, Thais have actively participated in elections. Voter turnout at national parliamentary elections has been between 40 and 65 percent. Civil

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<sup>124</sup> *ibid.*

<sup>125</sup> Federico Ferrara, 'Thailand: minimally stable, minimally democratic', *International Political Science Review*, 2011, 32(5), p.515.

<sup>126</sup> See Raluca Csernatonni, 'Policy Briefs: Radiography of a Conflict – Thailand's Penchants for Coups d'état', retrieved 21 May 2015, at <https://isiseurope.wordpress.com/2014/05/28/policy-brief-thailand/>.

<sup>127</sup> R H Taylor, *Elections and Democratization in Thailand*, Cambridge University Press, Cambridge, 1996, p. 185; Sasin Ditsawanon, 'Problems in the Consolidation of Democracy in Thailand: The Study of Trust in Political Institutions', *Kasetsart J. (Soc. Sci)*, 2010, 31, p. 167; James Ockey, 'Problems in the Consolidations of Democracy in Thailand', retrieved 21 May 2015, at <http://www.thaiconference.tu.ac.th/1011abstracts/PROBLEMS%20IN%20THE%20CONSOLIDATION%20OF%20DEMOCRACY%20IN%20THAILAND%20II.doc>.

liberties in Thailand have also been respected in comparison to its neighbours. Since 1978, the constitution has affirmed citizens' rights to free speech and a free press, with prohibitions only on insulting the monarchy, advocating a Communist system of government, or publishing materials threatening to national security. Since 1979 freedoms of assembly, speech, and religion have also been widespread, except in the brief periods of martial law.<sup>128</sup> (The only areas of speech that are persistently curtailed pertain to the royal family.) Although Buddhism is the state religion and the King must be a Buddhist, freedom of religion is respected for the nation's Muslims, Christians, Taoists, and Animists.

#### **2.4.2 The reception of the ombudsman in developing countries**

In the late 20th century, Asian countries experiencing modernisation began to introduce the ombudsman as an element of a modern state through attempts to strengthen the roles of civil society, administrative accountability, and control of government by people.<sup>129</sup> This is partly due to the fact that the ombudsman has received attention from the World Bank which often attached an ombudsman scheme as a component part to judicial and administrative reform packages.<sup>130</sup> Given the fact that the ombudsman came late to Asia, the Asian Ombudsman Association was established to strengthen the effectiveness of the ombudsman institutions in the region by encouraging information exchanges and cooperation among Asian countries.<sup>131</sup>

In the literature on the ombudsman, while it is suggested that the ombudsman is all the more necessary for the developing world where democracy exists but is young, unconsolidated, fragile, unstable or otherwise of poor quality,<sup>132</sup> doubts are

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<sup>128</sup> *Lese majeste*, Section 112 of the Penal Code imposes criminal punishment on negative speech regarding any member of the royal family.

<sup>129</sup> While the Ombudsman was introduced late in Asia, its original form can be found in ancient Asian civilizations. For instance, In Islamic countries, Mohtasibs used to perform as a type of the Ombudsman by touring cities/villages, monitoring works of government officials, and offer remedies for administrative abuses. In the 15th century, Korea began to offer a means to address civil complaints through the Sinmungo system during the Chosun Dynasty King Taejong's reign, see Linda C Reif, *The Ombudsman, Good Governance and International Human Rights System*, Martin Nijhoff, Leiden and Boston, 2004.

<sup>130</sup> World Bank, *Governance and Development*, 24, 1992; see also World Bank, 'Fostering Institutions to Contain Corruption', 24 *PREMNOTES*, 1999.

<sup>131</sup> The AOA currently has 31 members from 17 countries; see Pang Jiaying and Lai Io Cheong, *Comparative Study of Ombudsman Systems of Asia-Review of Systems in Macao, Korea and India*, AOA Members Studies, 2009, p.9.

<sup>132</sup> D C Rowat, 'Preface', in D C Rowat, (ed.), *The Ombudsman: Citizen's Defender*, 2nd ed., George Allen & Unwin, London, 1968, pp. v-xxiv, pp. xxiii-xxiv; I Scott, 'Functions of the Ombudsman in underdeveloped countries', *International Review of Administrative Sciences*, 1984, Vol. L No. 3, pp. 221-6.

often expressed that an ombudsman institution can work well. As with institutional transplants generally, it has been argued that few countries in developing countries offer a political and social panorama conducive to a liberal democratic invention such as the ombudsman, which is better understood as ‘an institution for more developed countries’.<sup>133</sup>

This concern is supported by the empirical evidence which suggests that a number of ombudsman schemes in many developing countries have run into a wide variety of difficulties and inadequacies that, relatively speaking, make it much less effective and its operation problematic in varying degrees.<sup>134</sup> While it is observed that the effectiveness of an ombudsman office is undermined by many factors, the most visible challenges to the effectiveness of the ombudsman in new democracies are circumstances: where the ombudsman has been subjected to ‘politicized’ positioning; where the ombudsman institution’s budget and staff has been reduced by the government; and where the government fails to provide the ombudsman with the political, financial, and infrastructure support necessary to give the institution effectiveness and legitimacy within the political and social context in which it operates.<sup>135</sup>

But a careful examination of the operations of the ombudsman systems in various parts of the developing countries indicate that although they suffer from many problems and limitations, the institution can be claimed to have done a fairly good job in varying degrees. For example, in Peru the *Defensoria del Pueblo* is noted for its relative effectiveness in playing a significant role in addressing the urgent needs and demands of Peruvian citizens in an often adverse political and institutional terrain, through the articulation and facilitation of rights.<sup>136</sup>

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<sup>133</sup> Walter Gellhorn, *Ombudsmen and Others: Citizens' Protectors in Nine Countries*, Harvard University Press, Cambridge, 1966, p. 153; Charles Manga Fombad, ‘The Enhancement of Good Governance in Botswana: A Critical Assessment of the Ombudsman Act, 1995’, *Journal of Southern African Studies*, Vol. 27, No. 1, Mar. 2001, p. 77.

<sup>133</sup> Thomas Pegram, ‘Accountability in Hostile Times: The Case of the Peruvian Human Rights Ombudsman 1996-2001’, *Journal of Latin American Studies*, Vol. 40, no. 1, Feb. 2008.

<sup>134</sup> G Caiden (ed.), ‘Ombudsman in developing democracies: Comment’, *International Review of Administrative Sciences*, 1984, 50, 221-226; Triparna Vasavada, ‘Corruption and Democratic Governance in India’, in Gedeon M Mudacumura, Göktuğ Morçöl (eds.), *Challenges to Democratic Governance in Developing Countries*, Springer Science & Business Media, 2014, p. 200.

<sup>135</sup> Najmul Abedin, ‘The Ombudsman in developing democracies: the Commonwealth Caribbean experience’, *International Journal of Public Sector Management* Vol. 23 No. 3, 2010 pp. 221-253.

<sup>136</sup> Pegram, n. 146.

In this respect, an allusion to O'Donnell's works may be useful in understanding the work of an ombudsman in developing countries. According to O'Donnell, in whose works there is a focus on horizontal accountability institutions in new democracies, common key problems in developing countries are of weak democratic institutions, and an environment where the rule of law is low, creating a 'weak institutional environment' that leads to institutional weakness.<sup>137</sup> He points out that a problem with a weak institutional environment is that 'a weak or uneven rule of law has long enabled powerful actors to violate or ignore certain rules with impunity',<sup>138</sup> thus even where formal rules are in place, enforcement depends on the de facto discretion of the rulers which results in variations in actual compliance. An example cited to support this assertion is that despite the existence of a U.S.-style constitutional provision guaranteeing lifetime tenure security to Supreme Court justices in Argentina, it is found that between the 1940s and the mid-2000s nearly every incoming president purged or packed the Court leading to the conclusion that there is no relationship between levels of de jure and de facto independence in Latin American judiciaries.<sup>139</sup>

Notwithstanding the problems, O'Donnell cautions that this does not mean that all formal institutions are uniformly weak in developing countries (nor all uniformly strong in developed ones). This explains why one finds considerable variation in institutional strength within one particular region (in his study, Latin America), across countries and within national territories.<sup>140</sup> Following this logic, a study on the effectiveness of the ombudsman in Latin America showed that while there are difficulties in a hostile environment, an ombudsman can make significant contribution

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<sup>137</sup> Guillermo O'Donnell, 'On the State, Democratization, and Some Conceptual Problems: A Latin American View with Some Postcommunist Countries', *World Development* 21, No. 8:1355–69, 1993; Guillermo O'Donnell, 'Delegative Democracy', *Journal of Democracy* 5, 1994, No. 1: 55–69; Guillermo O'Donnell, 'Illusions about consolidation', *Journal of Democracy* 7(2), 1996:34–51; Guillermo O'Donnell, 'Polyarchies and the (un)rule of law in Latin America: a partial Conclusion,' in J Mendez, Guillermo O'Donnell, P S Pinheiro, *The (Un)rule of Law and the Underprivileged in Latin America*, (ed.), Univ. Notre Dame Press, Notre Dame 1999, pp. 303–337; Guillermo O'Donnell, *Democracy, Agency, and the State: Theory with Comparative Intent*, Oxford University, Press Oxford, 2010.

<sup>138</sup> See O'Donnell (1993, 1999), n. 137.

<sup>139</sup> Gretchen Helmke, *Courts under Constraints: Judges, Generals, and Presidents in Argentina*, Cambridge University Press, New York, 2004, cited in Steven Levitsky, María Victoria Murillo, 'Building Institutions on Weak Foundations: Lessons from Latin America',

<sup>140</sup> Steven Levitsky, María Victoria Murillo, 'Building Institutions on Weak Foundations: Lessons from Latin America', Paper presented at the conference "Guillermo O'Donnell and the Study of Democracy", in Buenos Aires, March 26–27, 2012, retrieved at, <http://www.isp.org.pl/uploads/filemanager/BuildingInstitutionsonWeakFoundationLessonsfromLatinAmericaLevitskyMurillo.pdf>.

if the following factors exist to facilitate remedial measures for effectively dealing with the problems: the capacity of the first appointee and personnel; the robustness of the institution's foundations (this topic will be explored further in Chapter 3, 4 and 7); and successful alliance-building in order to enhance accountability.<sup>141</sup>

The ombudsman institutions in Poland, Estonia, Slovenia, Lithuania, and Hungary have also been cited as leading ombudsman institutions which survived the initial difficulties and can serve as models for other institutions in terms of their role in consolidating democracy in the former communist bloc.<sup>142</sup> A study of the ombudsman's impact on the democratisation process indicated that the ombudsman helped reinforce democratic principles for the good governance and restore a climate of confidence between governments and citizens.<sup>143</sup> In general, according to the 2000-2001 Washington-based Freedom House survey, countries succeeding in the ombudsman concept have higher freedom rates than those lagging behind.<sup>144</sup>

It is also noteworthy that in fact new ombudsman institutions in developing countries have significantly contributed to the evolution and expansion of the ombudsman beyond the classic oversight function of the Scandinavian ombudsman.<sup>145</sup> This is because in developing countries an ombudsman is often established in the context of a domestic process of democratisation and rule of law reform. Given this collective reform moment which coincides with its formation, the ombudsman is often vested with a wide array of competencies, much wider than ombudsmen in more established democracy in terms of constitutional control of legal norms and acts and control of the administration.

In short this section contends that while it can be seen that the transplant of the ombudsman has been problematic, the model has proved to be dominant in developing countries. It has further argued that however imperfectly, the ombudsman model does have a place in a developing country and it should not be assumed that this institution will fail because of the potentially unfavourable context of its working environment.

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<sup>141</sup> Thomas Pegram, 'Weak Institutions, Rights Claims and Pathways to Compliance: The Transformative Role of the Peruvian Human Rights Ombudsman', *Oxford Development Studies*, Vol. 39, No. 2, June 2011.

<sup>142</sup> Ulziibayar Vangansuren, *The Institution of the Ombudsman in the Former Communist Countries* Paper written under the Charles and Kathleen Manatt Democracy Studies Fellowship at IFES July - August, 2002 International Foundation for Election Systems Washington, D.C. 2005.

<sup>143</sup> Emma Gilligan, 'The Human Rights Ombudsman in Russia: the Evolution of Horizontal Accountability', 32 *Hum. Rts. Q.* 575, 2010.

<sup>144</sup> Vangansuren, n. 146.

<sup>145</sup> Pegram, n. 155.



Moreover, although the Thai constitution is imperfect, it still retains the basic foundations of liberal democracy, and this study will go on to argue that all the evidence indicates that the imperfection of the Thai Ombudsman has more to do with itself, rather than the overall pressure it faces as a result of political instability.

## 2.5 Conclusion

This chapter has laid down the background and context necessary to understand the need and justification for the ombudsman institution. Liberal constitutional theory is based on the need to control the exercise of public powers in order to safeguard the rights and liberty of the individual. For this purpose constitutional mechanisms have been created and structured to prevent the excessive use of state power through political and legal means by the legislature and judiciary. However the degree to which these traditional means can deliver constitutional accountability is limited. The courts have no concern with the conduct of public authority, as long as it proceeds within legal powers. But in fact not all administrative grievances are caused by illegal acts. Legislative control can oversee both legality and appropriateness; however the executive monopoly has diminished the capacity of impartial scrutiny. Further, the elected, besides having limited time and resources, are more interested in formulating policies and making sure that they are executed closely to policy. Therefore, by itself, political control is also not always a suitable means by which to control massive day-to-day administrative operation and resolve individual grievances. Meanwhile, the expansion of modern government functions and power has created a more fertile ground for invasion into individual rights and liberty.

Against this background an idea to introduce a machinery to add more protection for citizens has emerged. The concept of the ombudsman as an instrument to ensure that a public organisation performs its functions effectively and properly delivers the services to the citizens is fit for the purpose of the constitution to provide effective control. Its role is not to replace or interfere with the power of the existing institutions, but it can work to supplement their authority and effectiveness where there is a gap in the existing system.<sup>146</sup>

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<sup>146</sup> Donald C Rowat, *The Ombudsman Plan*, the University Press of America, 1985, p. 58; Buck et al., n. 8, p. 16.

In the next chapter, we will turn to the office of the ombudsman in more detail. The theoretical benefits and ideal construction of the ombudsman institution, as well as its core characteristics will be studied. This next chapter will provide a thorough understanding of the institution of the ombudsman before the central subject of this thesis – that is, the Thai ombudsman – is investigated in Part II of the thesis.

## Chapter 3

### The Tradition Roles of the Ombudsman

In the previous chapter the emergence of the ombudsman institution was theoretically linked with accounts of the liberal democratic constitution based on the traditional tripartite system. The exercise was undertaken in order to demonstrate the potential for constitutional deficiencies which an ombudsman might be created in part to fill. The aim of this chapter is to examine in more detail the institution and its roles.

As mentioned in Chapter 2, since the office began to appear and has taken firm hold as an accountability instrument in the late 1960s, there has been a massive proliferation of such institutions throughout the world.<sup>1</sup> One important factor for such wide adoption is the Ombudsman's ability to tackle a common problem found in contemporary societies with a modern welfare state: the increasing need to more effectively monitor and check the rapidly expanding power of the administrative machinery.<sup>2</sup> Frequently, this problem has led to the ombudsman being introduced as a complaint handler. But today although improving administration may remain the ombudsman's core importance, complaints handling is only one of several functions discharged by ombudsman offices.<sup>3</sup>

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<sup>1</sup> L B Hill, 'International transfer of the ombudsman', in R L Merritt (ed.), *Communication in International Politics*, University of Illinois Press, Urbana, 1972, pp. 295-317; G E Caiden, (ed.), *International Handbook of the Ombudsman: Country Surveys*, Vol. 2, Greenwood Press, Westport, 1983; Linda C Reif, 'Foreword', in Linda C Reif (ed.), *The International Ombudsman Yearbook*, Vol. 10, p. xiii-xiv, Martinus Nijhoff, Leiden, 2009; Donald C Rowat, 'Ombudsman for North America'. *Public Administration Review*, 1964, p. 231; Donald C Rowat, 'The suitability of the ombudsman plan for developing countries', *International Review of Administrative Sciences*, 50, 1984, pp. 207-211; Donald C Rowat, *The Ombudsman Plan: The Worldwide Spread of an Idea*, 2<sup>nd</sup> edn., University Press of America, Lanham, 1985, pp. 75-173; Roy Gregory and Philip Giddings, 'The Ombudsman Institution: Growth and Development', in Roy Gregory and Philip Giddings (eds.), *Righting wrongs: The Ombudsman in Six Continents*, IOS Press, Amsterdam, 2000, pp. 1-20; Victor O Ayeni, 'The Changing Nature and Contemporary Role of National Ombudsman Institutions in the Commonwealth and Elsewhere', in Linda C Reif (ed.), *The International Ombudsman Yearbook*, Vol. 4, Kluwer Law International, The Hague, 2001, p. 92.

<sup>2</sup> H Y Cheng, 'The Emergence and Spread of the Ombudsman', *the Annals of the American Academy of Political and Social Science*, Vol. 377, no. 1, May, 1968, 20-30; Linda C Reif, *The Ombudsman, Good Governance and the International Human Rights System*, Martinus Nijhoff, Leiden, 2004, p. 2-4;

<sup>3</sup> Victor O Ayeni, 'The Ombudsman in the Administrative Justice and Human Rights in the New Millennium', in Linda C Reif (ed.), *The International Ombudsman Yearbook*, Vol. 5, Kluwer Law

There has been a growth in the range of functions performed by the office, a trend which normally resulted from the need to accommodate technological, social, economic and political circumstances. This development means that there has arisen some questions posed by ombudsmen and academics as to what the scope of the new functions should be and how the ombudsman maintains effectiveness in the light of the functions it is required to deliver.<sup>4</sup> In this regard, in the ombudsman literature significant attention is given to the essential organisational characteristics of an ombudsman, adherence to which is often recognized as an important basis for a successfully functioning ombudsman's office and is seen as key to the effectiveness and growth of the ombudsman's office.<sup>5</sup> Scholars and ombudsmen alike appear to be in consensus that the institution will continue to adapt and be successful if it adheres to the essential characteristics, even where an ombudsman is also utilised to perform additional roles with those roles varying depending on the context in which it operates.<sup>6</sup> Conversely granting further functions to the office can lead to problems if their introduction is not made in line with the essential characteristics.<sup>7</sup> This means that there is a need to improve the current understanding of the institutional type and the conditions under which it could function best.

This premise is one that will be explored in this thesis. The issue is particularly relevant to Thailand where the ombudsman office has struggled in performing its functions to full success for the last thirteen years, with a concern that

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International, Leiden, 2001, pp. 43-44; Chris Field, 'Recent Evolutions in Australian Ombudsmen', presentation to the Australian Institute of Administrative Law National Forum, 2009, retrieved 2 January 2012; Michael Frahm, *Australia and Pacific Ombudsman Institutions, Mandate, Competence and Good Practice*, Springer, Vienna, 2013, p. 233.

<sup>4</sup> For example, John McMillan, 'The Expanding Ombudsman Role: What fits? what doesn't?', presentation to the Australian and New Zealand Ombudsman Association, Melbourne, 22 April 2008, retrieved 23 May 2013, [http://www.ombudsman.gov.au/files/27\\_March\\_2008\\_The\\_expanding\\_Ombudsman\\_role\\_What\\_fits\\_What\\_doesnt.pdf](http://www.ombudsman.gov.au/files/27_March_2008_The_expanding_Ombudsman_role_What_fits_What_doesnt.pdf); Dennis Pearce, 'The Ombudsman: Review and Preview: The Importance of Being Different', *The Ombudsman Journal*, No. 11, 1993, p. 17; and Anita Stuhmcke, 'Discretion, Direction and the Ombudsman: To Steer the Ship or to Choose the Ship?', Conference Papers Wellington, 2012, retrieved, 15 November 2013, <http://www.theioi.org/publications/wellington-2012-conference-papers>.

<sup>5</sup> Mary Seneviratne, *Ombudsman Public Service and Administrative Justice*, Butterworth, London, 2002, p. 7; Anita Stuhmcke, 'The Evolution of Classical Ombudsman: a view from the antipodes', *Int. J. of Public Law and Policy*, Vol.2, No.1, 2012, p. 11; McMillan, 'The Expanding Ombudsman Role', n. 4; and Pearce, n. 4, p. 17.

<sup>6</sup> E F Short, 'The Development and Future of the Ombudsman in Africa', in Reif (ed.), *The International Ombudsman Yearbook*, Vol. 5, n. 3, p. 62; Stuhmcke, 'Discretion, Direction and the Ombudsman', n. 4; John McMillan, 'Key features and strengths of the Ombudsman model – National Ombudsman Commission of Indonesia', Seminar and Training on Local Ombudsman, 22 - 25 June 2004, retrieved 2 February 2012, <http://www.ombudsman.gov.au>.

<sup>7</sup> Fredrik Ugglä, 'The Ombudsman in Latin America' *Journal of Latin American Studies*, Vol. 36(3), 2004, p. 428.

due to the expansion of roles given to the office there has been an adverse effect on the ombudsman's effectiveness in performing its core operations.

In this work I distinguish two clear variants: the core role of the ombudsman, which is often referred to as the 'traditional' or 'classical' role, and the 'non-traditional' roles or 'additional' roles that have been given to the ombudsman over the years (which will be studied in the next chapter).<sup>8</sup> This approach is taken because it is likely to be useful in the sense that it gives a clearer picture of the theory and methodology of the ombudsman, how this relates to the institutional design and its essential features, and the effectiveness of the ombudsman and the challenges it faces when it assumes different roles. Later in this thesis, these differences will become apparent in the set-up of the Thai Ombudsman.

This chapter begins with a review of literature on the traditional role of ombudsman and then seeks to understand the basic institutional design characteristics of the ombudsman institution. Ideas established here will be used to assess the ability of the Thai Ombudsman to perform the traditional roles of the ombudsman and extracts standards from the literature on characteristics of the ombudsman institution that could be used to develop evaluation criteria that will be applied to the Thai Ombudsman Office.

### **3.1 The traditional roles of the ombudsman**

While there are different interpretations of the 'ombudsman' concept and the institution cannot be precisely defined, the roles common to all ombudsmen are usually understood to be resolving complaints and improving administrative practice.<sup>9</sup> These two roles are normally discussed together in the ombudsman

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<sup>8</sup> Linda C Reif, 'Ombudsman and Human Rights Protestation and Promotion in the Caribbean: Issues and Strategies', in Victor O Ayeni, Linda C Reif, H Thomas (eds.), *Strengthening Ombudsman and Human Rights and Institutions in Commonwealth Small and Island States*, Chameleon House Limited, London, 2000, pp. 160-163.

<sup>9</sup> Roy Gregory, 'Building an Ombudsman Scheme: Statutory Provisions and Operating Practices', in Linda C Rief (ed.), *The International Ombudsman Anthology: Selected Writings from the International Ombudsman Institute*, Kluwer Law International, the Hague, 1999, p. 130; Reif, 'Ombudsman and Human Rights Protection and Promotion in the Caribbean', n. 10; Short, n. 6, p. 70; and Stuhmcke, 'The Evolution of Classical Ombudsman', n. 5, p. 11; and Thomas Pegram, 'The Politics of Accountability: The Institution of the Ombudsman in Comparative Perspective', paper presented at the II REPLA Annual Workshop, Nuffield College, University of Oxford, 26–28 March, 2008; and African Research Center, 'Information, Coordination, Training, Advocacy and Research Needs of the African Ombudsmen and Mediators Association', Report, GLZ, June 2011, p. 8; Alice Tai, 'The Impact of Social and Political Environment and Their Influence on the Work of the Ombudsman: Hong Kong', in Reif (ed.), *The International Ombudsman Yearbook*, Vol. 5, n. 3, p. 73.

literature as ‘redress and control’<sup>10</sup> or ‘firefighting and firewatching’.<sup>11</sup> The word “role” as used here implies both the overall functions and the procedures which the ombudsman operates in attempting to perform his roles.

### 3.1.1. Resolving individual complaints

Many ombudsman offices have the core role of investigating individual complaints against the state.<sup>12</sup> This role has been reflected in a number of descriptions of the ombudsman institution formulated by ombudsman associations around the world. For example the International Ombudsman Institute’s Bylaws identify the classical legislative ombudsman as ‘[T]he office of a person ... whose role is to investigate citizen complaints concerning administrative acts or decisions of government agencies...’.

The International Bar Association (IBA) likewise describes the ombudsman as: ‘[A]n office ...who receives complaints from aggrieved persons against government agencies, officials, and employees or who acts on his own motion and who has the power to investigate, recommend corrective action, and issue reports’.<sup>13</sup>

The African Ombudsman Association provides that the ombudsman ‘is an independent, impartial public official with authority and responsibility to receive, investigate the complaints of ordinary citizens about the actions of government departments and institutions, and, when appropriate, make findings and recommendations’.<sup>14</sup>

The Asian Ombudsman Association does not give a definition of the ombudsman but a review of the enabling statutes of members of the Asian Ombudsman Association reveals that most of them have the power to conduct

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<sup>10</sup> For example, Seneviratne, n. 5; and Katja Heede, *European Ombudsman: redress and control at Union Level*, Kluwer Law International, The Hague, 2000.

<sup>11</sup> Carol Harlow and Richard Rawlings, *Law and Administration*, Butterworth, London, 1997, pp. 423-455.

<sup>12</sup> Linda C Reif, *The Ombudsman, Good Governance and the International Human Rights System*, Martinus Nijhoff, Leiden, 2004, p. 2; African Ombudsman Research Centre, *Comparative Analysis of Legal Systems Governing Ombudsman Offices in Africa*, 31 January 2014, pp. 60-69, retrieved 24 February 2014, [http://aoma.ukzn.ac.za/Libraries/MISCEL\\_ENGLISH/AORC\\_Comp\\_AnalysisDrftRepMar14\\_Final\\_2.sflb.ashx](http://aoma.ukzn.ac.za/Libraries/MISCEL_ENGLISH/AORC_Comp_AnalysisDrftRepMar14_Final_2.sflb.ashx).

<sup>13</sup> Cited in Gail H Morrison, ‘Decisions by the Ombudsman and Review by the Legislature: Rules, Principles and Policy’, *Ombudsman Journal*, No. 8, 1989, pp. 1- 2.

<sup>14</sup> African Ombudsman Association ‘What an Ombudsman is and does’, retrieved 24 February 2014, [http://www.aoma.org.za/component/option.com\\_frontpage/Itemid.1/](http://www.aoma.org.za/component/option.com_frontpage/Itemid.1/).

investigations to identify and correct weaknesses in procedures practices, or rules in public administration.<sup>15</sup>

The definitions and the ombudsman practice noted above demonstrate that an ombudsman operates in the sphere of public administration, a task which fundamentally involves the translation and application of broad legislative policy to individual situations. This raises a complex challenge for the ombudsman as it is widely recognised that the office generally does not have the right to intervene in the exercise of executive discretion or interfere with the merits of differing social and economic policies or the adjudication of cases, issues which are the remit of the legislature and the courts.<sup>16</sup>

Characterised by its roles, the ombudsman therefore functions to supplement pre-existing mechanisms of remedial justice by which citizens can assert their individual interest against the administration. The ombudsman is capable of performing such roles because it yields three major effects: increased access to justice; effective dispute resolution and review of improper administrative practice. Each of these areas are discussed in turn below.

### ***Increased access to justice***

It is telling that the purpose of adopting the ombudsman system in many countries was to supplement existing provisions, such as parliament, the court, and internal complaints procedures in protecting citizens against expanding administration.<sup>17</sup> It was deemed necessary since governments were having an increasing impact on citizens' lives.<sup>18</sup> As observed in the previous chapter, there are problems with the basic separation of powers model in terms of delivering individual justice. The political process does not always provide a practical way by which an individual citizen can obtain a remedy for an administrative grievance. Litigation is too often associated with complicated procedures, high cost, and the length of time consumed. Conversely, filing complaints through the internal dispute resolution route

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<sup>15</sup> George V Carmona, 'Strengthening the Asian Ombudsman Association and the Ombudsman Institutions of Asia', in Asian Development Bank, *Strengthening the Ombudsman Institutions in Asia*, Asian Development Bank Economics Research Paper Series, Asian Development Bank, Mandaluyong City, 2011, p. 7.

<sup>16</sup> Stephen Owen, 'The Ombudsman: Essential Elements and Common Challenges', in Reif (ed.), *The International Ombudsman Anthology*, n. 9, pp. 51-71.

<sup>17</sup> Claude-Armand Sheppard, 'An Ombudsman for Canada', 10 *McGill L J* 291, 1964.

<sup>18</sup> Donald C Rowat, *The Ombudsman: Citizen's Defender*, 2<sup>nd</sup> edn., George Allen and Unwin, London, 1968.

provided by departments of administrative entities offers a more economical and convenient way forward than judicial proceedings, and can work effectively in dealing with administrative faults. The internal complaint system, however, is inevitably hampered by intricate human relationships and the perception that it lacks independence.<sup>19</sup>

Contrary to other approaches, the ombudsman system possesses the benefits of being independence, procedural convenience, the inquisitorial method and wider admissible scope.<sup>20</sup> In theory, an ombudsman's ability to employ inquisitorial investigation to examine complaints can minimize the inequality of power, — particularly as regards technical knowledge — that generally exists between a complainant and government agencies.<sup>21</sup> The fact that disputants are not equally matched in terms of power could advantage the stronger party, disadvantage the weaker one, and result in injustice. The inquisitorial process, together with the powers that the ombudsmen possess to gain access to information, gives the ombudsman an advantage of finding the sort of evidence needed to resolve administrative complaints. In this way the complainant is assisted too in terms of gaining access to information, since in most cases it is the ombudsman who takes the burden of gathering evidence and the ombudsman who prepares the argument and shapes conclusions. Further, where the office is connected to the legislature, in principle parliamentary support gives the ombudsman a status to level the playing field between public authorities and an individual citizen. Therefore the ombudsman can more effectively counter any inequality of arms that might otherwise diminish the fairness of the process.<sup>22</sup>

Before their introduction, it was often argued that there was no need for an ombudsman in countries that possess strong administrative courts and legal systems.<sup>23</sup> However, the long standing history of the Swedish Ombudsman meant that the parallel existence of an ombudsman and a Supreme Administrative Court in Sweden provided evidence that they could exist in tandem without an

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<sup>19</sup> John E Moore, 'Ombudsman and the Ghetto', 1 *Conn. L. Rev.* 244 1968, p. 247.

<sup>20</sup> H Woolf, J Jowell and Le Sueur (eds.), *De Smith Judicial Review*, 6<sup>th</sup> edn., Sweet & Maxwell, London, 2007, p. 49, para 1-083.

<sup>21</sup> Stuhmcke, 'The Evolution of Classical Ombudsman', n. 5, p. 5.

<sup>22</sup> S Jägerskiöld, 'Swedish Ombudsman', *University of Pennsylvania Law Review*, Vol. 109, No. 8, June, 1961, 1080.

<sup>23</sup> M N Questiaux, 'How administrative courts meet the need', in Rowat, (ed.), *The Ombudsman: Citizen's Defender*, n. 18, pp. 217-18.



unnecessary duplication of functions.<sup>24</sup> France's introduction of the ombudsman system in the early 1970s is typical of the generally accepted relationship between the courts and the ombudsman. In France the ombudsman was established 'to complement the work of the *Conseil d'État*.'<sup>25</sup> The process of the ombudsman's investigation is informal and flexible. The complainant pays no fee and there is an element of personal touch. In essence, an ombudsman and the administrative court, while their roles may overlap to some extent, operate in quite different ways and hence fulfilling a different need.<sup>26</sup>

An argument for the parallel existence of the court and the ombudsman is that in general it is unrealistic to expect people to pursue complaints in the courts. It was even argued that in many cases, the citizen bore with injustice because he could not afford or does not wish to pursue litigation.<sup>27</sup> There is no doubt that a certain amount of jurisdictional overlap with existing administrative or judicial recourses is inevitable but in general the ombudsman has discretion to refuse to investigate complaints before all administrative recourses have been exhausted or if the matter is before the courts. For this the office of ombudsman was introduced to fill that deficit: to ensure that public members in dealing with government departments have the right and opportunity to obtain an independent review of administrative decisions and in turn increase the opportunities for redress.

### ***Effective dispute resolution mechanism***

As well as improving the capacity for citizens to access justice, ombudsman schemes can offer a remedial service much more in tune with the needs of the complaint. In much recent work in the UK, this goal has been referred to as proportionate and appropriate dispute resolution.<sup>28</sup>

In recognition of the fact that many complaints are resolved without the need for investigation and recommendation; during the 1970s many ombudsman offices

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<sup>24</sup> K Holmgren, 'The need for an ombudsman too', in Rowat (ed.), *The Ombudsman: Citizen's Defender*, n. 18, p. 226.

<sup>25</sup> Frank Stacey, *Ombudsman Compared*, Clarendon Press, Oxford, 1978, p. 92; Edwards B Jolliffe, *The Inevitability of the Ombudsman*, *Admin. L. Rev.* 99, 1966-1967, p. 101.

<sup>26</sup> Donald C Rowat, 'Conclusion', in Rowat, *The Ombudsman: Citizen's Defender*, n. 18, p. 289; Gavin Drewry, 'Ombudsmen and Administrative Law - Bright Stars in a Parallel Universe?', 17, *Asia Pac L Rev*, 3, 2009, p. 16.

<sup>27</sup> B Frank, 'The Ombudsman Revisited', *the Journal of International Bar Association*, May, 1975, pp. 48-60.

<sup>28</sup> Administrative Justice and Tribunals Council, *Putting It Right – A Strategic Approach to Resolving Administrative Disputes*, June 2012, p.8, retrieved 12 February 2014, <http://ajtc.justice.gov.uk/docs/putting-it-right.pdf>.

began to develop a more flexible approach to complaint handling. This approach diverged significantly from the 'investigation and report' mode of operation which had characterized the office in earlier years, and has been referred to as 'the intervention method'<sup>29</sup>. Owen emphasized that the primary role of the ombudsman is 'to strive for the mutually acceptable resolution of a problem rather than necessarily finding of faults or the absence of it, the office should attempt to provide informal mediation services wherever such an approach may be productive'.<sup>30</sup>

Ombudsman offices have increasingly focused on the possibility of conciliation, and on facilitating a solution satisfactory to the complainants and the agencies concerned as quickly and informally as possible. This function may not be explicitly stated in legal provisions in most countries, but, through a range of techniques the ombudsman nowadays plays an important role in mediating conflicts between individuals and government agencies. For example in many ombudsman schemes today, in the cases where the complaints can be resolved satisfactorily by a telephone call, the ombudsman will not usually conduct, or continue with, a formal investigation. The UK Ombudsman under Ann Abraham made it clear that the office seek to achieve a solution without full investigation in order to bring a satisfactory and more flexible response to a complaint.<sup>31</sup> Reflecting this evolution of practice, the British Columbia Ombudsman has been given a statutory mandate to consult with an authority to attempt to settle the complaints at any time during and after investigation.<sup>32</sup>

Often cases are resolved by telephone calls and with minimum formality, and not so much on the investigation and the identification of what has gone wrong. Citizens generally do not understand workings and policies of the government. The ombudsman can assist with the complainants by gathering facts for both parties and let the parties communicate with one another and find resolution. The ombudsman intervenes to facilitate communication between these departments and the citizens.

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<sup>29</sup> Marten Oosting, 'The Ombudsman: A Profession', keynote speech presented at the work Strengthening the Ombudsman Office in Africa August 16, 1996, retrieved 12 February 2014, <http://www.info.gov.za/speeches/1996/1114335896.htm/>.

<sup>30</sup> Owen, n. 15, pp. 51-71.

<sup>31</sup> Health Service Ombudsman, 'Care and compassion?', Report on ten investigations into NHS care of older people, p. 8, retrieved 3 June 2013, [http://www.ombudsman.org.uk/\\_data/assets/pdf\\_file/0016/7216/Care-and-Compassion-PHSO-0114web.pdf](http://www.ombudsman.org.uk/_data/assets/pdf_file/0016/7216/Care-and-Compassion-PHSO-0114web.pdf).

<sup>32</sup> S Skinner and C Hyman, 'The Ombudsman Offices in Denmark and British Columbia, Canada: A Comparative Study', in Linda C Reif (ed.), *The International Ombudsman Yearbook*, Vol. 5, Martinus Nijhoff, Leiden, 2001, p. 92.

Such an approach is particularly appropriate with administrative disputes that do not require complex presentation of evidence. In the Netherlands, this ‘intervention method’ can solve the problems such as delay and difficulties in getting in touch with a government officials, which constitute 80 per cent of the complaints received by the Netherlands National Ombudsman.<sup>33</sup> Asian ombudsman offices emphasizing this alternative dispute resolution role include Japan, South Korea, Indonesia, Pakistan, the Philippines, and Thailand.<sup>34</sup>

### ***Reviewing improper administrative practice***

As its mandate is rarely restricted to legality review, securing individual rights in the area where the court cannot provide sufficient redress is generally considered to be one of the main advantages an ombudsman has over other existing review mechanisms.<sup>35</sup> While performing reviews beyond a study of strict matters of legality is part of the task of parliament, auditor-generals, and internal administrative supervisory authorities, the ombudsman can play a role alongside such mechanisms by emphasizing matters that go beyond the political, financial or efficiency aspects of the complaint. In other words ombudsmen are well placed to pronounce on good administration.

The following description of the Ombudsman of the European Union illustrates the important aspect of an ombudsman.

[T]he EU Ombudsman’s task is to supplement the legal rights available to the individual against the [European] Community with legitimate political pressure where the individual suffers an instance of unjust treatment from a Community authority but is left without a legal remedy.<sup>36</sup>

In this respect, the ombudsman normally looks at standards of proper administrative practice that do not - or do not yet - lie within the competence of the courts, but support expectations which any public member of contemporary modern

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<sup>33</sup> Roy Gregory, ‘The Ombudsman: An Excellent Form of Alternative Dispute Resolution’, in Linda C Reif (ed.) *International Ombudsman Yearbook*, Vol. 5, n. 33, pp. 111-112.

<sup>34</sup> Seong P Hong, *A Comparative Study on Ombudsman Institutions in Asian Region*, Anti-Corruption & Civil Rights Commission, Republic of Korea, 2011, p. 38, retrieved 3 June 2013, [www.acrc.go.kr/eng/file/file.do?command=downFile&encodedKey](http://www.acrc.go.kr/eng/file/file.do?command=downFile&encodedKey).

<sup>35</sup> B Wakem, ‘Achieving Administrative Justice and Procedural Fairness in Ombudsman Investigations’, speech given at the Australian and New Zealand Ombudsman Association (ANZOA) Inaugural Conference, Melbourne, 22 – 23 April 2008, retrieved 23 June 2013, [http://www.ombudsman.parliament.nz/ckeditor\\_assets/attachments/118/bw\\_anzoa\\_2008\\_speech\\_-\\_the\\_role\\_of\\_the\\_ombudsman\\_alongside\\_the\\_courts\\_in\\_achieving\\_administrative\\_justice.docx?1345076080](http://www.ombudsman.parliament.nz/ckeditor_assets/attachments/118/bw_anzoa_2008_speech_-_the_role_of_the_ombudsman_alongside_the_courts_in_achieving_administrative_justice.docx?1345076080).

<sup>36</sup> M Hedemann, ‘The individual and the EC Ombudsman’, *New Law Journal*, 6 May, 1994, p. 609.

society can rightly expect their government to observe, articulate and support.<sup>37</sup> To illustrate the form of expectation being covered here, there are many examples of the role the ombudsman can play in resolving injustice, where there is a loss but no legal remedy.

In France, case No. 670 is cited as an example of how the French *Mediateur* found that the government had acted according to the law but in an unjust manner.<sup>38</sup> This case concerned the acceptance by the complainant of a refund in full and final settlement. Under the terms of the agreement, the acceptance meant that the complainant was forced to give up the right to contest any further the matter under dispute. The French *Mediateur* found this to be an example of how the government had acted according to the law but in an unjust manner.<sup>39</sup>

Similarly, in the UK, in the *A Debt of Honor* report,<sup>40</sup> the Ombudsman found that there had been a real loss suffered by a number of complainants due to problems caused by the inconsistent eligibility criteria developed by the government to manage the compensation scheme concerned. But there was no legal error that the complainants could rely upon, as found in a court case which ran parallel to the Ombudsman investigation.<sup>41</sup> Nevertheless, the Ombudsman recommended that the government apologise to those affected, review the operation of the scheme, and, if appropriate, reconsider the position of the complainant and those in the same position. The reason being once again is that there had been a failure in administrative practice, notwithstanding the lack of clear breach of a legal standard. For the Parliamentary Ombudsman, the Ministry of Defence were expected apply a degree of care and attention, transparency and foresight of the consequences for affected parties that went beyond mere observation of basic legal standards.

Likewise, in Canada, in *Haymour Holding Ltd. v R. In Right of British Columbia*,<sup>42</sup> the British Columbia Ombudsman recommended the government to make ex gratia compensation and legal expenses totalling over 160,000 dollars, with

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<sup>37</sup> See P Nikiforos Diamandouros, 'Legality and good administration: is there a difference?', speech at the sixth seminar of National Ombudsmen of EU Member States and Candidate Countries on 'Rethinking Good Administration in the European Union', Strasbourg, France, 15 October 2007, retrieved 7 October 2013, <http://www.ombudsman.europa.eu/speeches/en/2007-10-15.htm>.

<sup>38</sup> Ivan Mifsud and Cecile Plaidy, 'The Roles of Administrative Courts and Ombudsmen in France and Malta: A review of Two Contrasting Systems', in Linda C Reif (ed.), *The International Ombudsman Yearbook*, Vol. 8, Martinus Nijhoff, Leiden, 2004, p. 64.

<sup>39</sup> *ibid.*

<sup>40</sup> Fourth Report of the Parliamentary Commissioner for Administration HC 324 (2004-05).

<sup>41</sup> See *ABCIFER v Ministry of Defence*, (2003) 3 WLR 80.

<sup>42</sup> (1986) 6 BCLR (2d) 145.

an apology to an individual who suffered from government actions which the court had previously found to be ‘discriminatory, misleading, highly improper, unfair and bad faith’. The court may have found in favour of the individual, but did not award personal damages or punitive damages against the crown because there was no remedy at law for such loss.

The previous examples make it clear that the ombudsman’s work goes beyond the enforcement of law – and goes beyond legal questions, which allows investigation of injustice and fairness. The remedy recommended by an ombudsman also frequently extends beyond the sort of redress that a complainant could normally expect to obtain from the court and tribunal process. Therefore, it is often argued that one important reason for establishing ombudsmen is to deal with grievances for which no remedy is available in court, because as no legal right has been infringed, the matter is not actionable.<sup>43</sup> As it has come to realise that the criteria exclusively focused on the question of ‘legal’ rights does not always provide an adequate remedy. It is now widely accepted that an ombudsman has a role to play alongside courts, tribunals and other bodies in providing remedial help to people who have suffered injustice from defective administration.<sup>44</sup>

### **3.1.2. Promote good administration**

Increasingly, concentrating only on complaint-handling is not seen as a sufficient objective for the ombudsman.<sup>45</sup> Ombudsmen have been urged to make more use of their capacity by using their complaint role to identify areas of public administration that are a common source of complaints from the community. With such knowledge it is argued ombudsmen can analyse the underlying causes of administrative problems and assist agencies in remedying the flaws in their processes in order to prevent mistakes from occurring in the future.<sup>46</sup> In this move, many ombudsmen have introduced a systemic approach by taking a proactive role of being

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<sup>43</sup> Seneviratne, n. 5, p. 55; and H W R Wade, *Administrative Law*, 3<sup>rd</sup> edn., Oxford University Press, Oxford, 1971, p. 12.

<sup>44</sup> *ibid.* As noted by Wade in his textbook that the ombudsman was to ‘operate beyond the frontier where the law stops’.

<sup>45</sup> G E Caiden and D A Valdes, ‘Maturation Issues for the Ombudsman’, in Reif (ed.), *The International Ombudsman Anthology*, n. 9, pp. 101-127; Anita Stuhmcke, *An Empirical Study on the Systemic investigations Function of the Commonwealth Ombudsman for 1977-2005*, unpublished thesis submitted for the degree of Doctor of Philosophy, The Australian National University, p. 29.

<sup>46</sup> Seneviratne, n. 5, p. 16; G E Caiden, ‘The Challenge of Change’, paper presented at the Fourth International Ombudsman Conference, Commonwealth Ombudsman, Canberra, 1989, at 29.

concerned that administrative failures are rectified to prevent mistakes from occurring in the future, in addition to its primary individual complaints handling role.<sup>47</sup>

One strong feature of the ombudsman is the depth and quality of its investigatory power which aids the expansion of this new role. During investigations, the ombudsman can gather all the facts and all of the necessary and useful considerations in order to identify evidence of systemic faults within an administrative process that leads to unlawful, unfair or wrong actions/decisions. Such evidence can then be compiled into a report that includes his findings, together with constructive advice and recommendations that direct the body concerned as to how to correct such procedure, regulation or legislation on the basis that it is the procedure/regulation/legislation that is the underlying cause of administrative faults and leading to injustice. Uncovering systemic weakness, therefore, can result in the government changing how it operates and a collective effect for all citizens. As an ombudsman has put it: '[A]...single and well-written report can be more effective in triggering political and departmental change than a decade of oversight by courts, tribunals and investigating agencies.'<sup>48</sup>

While there are other means by which system deficiency in government agencies can be checked, such as internal/external audit and an array of specialised bodies, review by an ombudsman is deemed necessary for a number of reasons. Unlike the review conducted by other constitutional watchdogs, the ombudsman has a broad investigatory power that can cover wide areas. Further, although mechanisms such as public enquiries or commissions can be set up to conduct comprehensive studies and make conclusions on a particular issue, the ombudsman is a permanently established body with long-standing body of residual knowledge and possesses an arguably high standing in the constitution. It is a body capable of making findings and recommendations based on thorough investigation and understanding of administrative process resulting from constructive engagement with the agencies being investigated.

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<sup>47</sup> Many ombudsmen in Asia have in their fact sheets a substantive entries under the heading 'Addressing Systemic Issues', more details see André Marin and Gareth Jones, 'Measuring Ombudsman Performance: Setting Performance Standards and Indicators', in Asian Development Bank, *Strengthening the Ombudsman Institutions in Asia*, n. 14, p. 201.

<sup>48</sup> John McMillan, 'The Ombudsman, Immigration and Beyond', Commonwealth Ombudsman, IPAA Seminar, Canberra, 25 October 2005, retrieved 24 July 2013, [http://ombudsman.gov.au/docs/speeches/IPAA-Immigration-and-beyond\\_25oct2005pdf](http://ombudsman.gov.au/docs/speeches/IPAA-Immigration-and-beyond_25oct2005pdf).

This ability to identify systemic problems is what makes the ombudsman considered as an important mechanism in the quality control of administration which calls for a more detailed scrutiny of an administrative decision-making process than a simple examination of the final decision or action undertaken. This role also brings the ombudsman closer to the centre of public policy making as an analyst, as well as a critic and counsellor. It is now accepted among ombudsmen that their core role is primarily concerned with complaints about specific decisions, but that they are also obliged to fulfil the wider role of improving procedures and bringing about desirable changes to legislations and policy.<sup>49</sup> In fact, there is now widespread evidence that ombudsman systemic investigations have resulted in changes in administrative procedures or practices, or even policies, in many countries.<sup>50</sup>

Because of its wider impact, systemic investigations have been strategically used to raise the profile of several ombudsman schemes.<sup>51</sup> For example, the Ombudsman of Korea from 2004 began publicising statistics recording its systemic impact.<sup>52</sup> However, caution has been expressed that systemic investigation is intended more to identify and correct substantive problems within public bodies and administration and can, arguably, lead to a reduction in efforts to redress the grievances of individual complainants.<sup>53</sup> In this respect, if the balance between these two roles can be struck, the ombudsman office can be a mechanism for resolving individual complaints and at the same time serve as a resource for government institutions in identifying and preventing administrative unfairness. Care needs to be taken, however, to ensure that a focus on systemic work does not reduce the capacity of individual complainants to pursue their grievances.

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<sup>49</sup> Dennis Pearce, *The Commonwealth Ombudsman Reports*, 41 (24) Canberra Survey 1, 1998, at 4; and John McMillan, 'Fighting Corruption While Safeguarding Human Rights', United Nations High Commission on Human Rights Conference on Anti-Corruption Measures, Good Governance and Human Rights', Poland, 8–9 November 2006, retrieved 1 June 2013, [http://www.ombudsman.gov.au/files/8\\_November\\_2006\\_Fighting\\_corruption\\_while\\_safeguarding\\_human\\_rights.pdf](http://www.ombudsman.gov.au/files/8_November_2006_Fighting_corruption_while_safeguarding_human_rights.pdf).

<sup>50</sup> Trevor Buck, Richard Kirkham and Brian Thompson, *The Ombudsman Enterprise and Administrative Justice*, Ashgate, Surrey, 2011.

<sup>51</sup> Anita Stuhmcke, 'Evaluating Ombudsman: A Case Study in Developing a Quantitative Methodology to Measure the Performance of the Ombudsman', *The International Ombudsman Yearbook*, Vol. 10, Kluwer Law International, The Hague, 2009, p. 23; Marin and Jones, n. 47, p. 202; Buck et al., n. 50, Chapters 4 and 5.

<sup>52</sup> Stuhmcke, *An Empirical Study on the Systemic investigations Function of the Commonwealth Ombudsman*, n. 45, p. 44.

<sup>53</sup> Anita Stuhmcke, 'Each for Themselves' or 'One for All?': The Changing Emphasis of the Commonwealth Ombudsman', 38 *Fed. L. Rev.* 143, 2010.

### 3.2 The essential features of an ombudsman

The previous section demonstrated that the ombudsman differs significantly from other traditional methods of handling grievances and has several important advantages over these methods. Taking these claims as a starting point, in Part II of this thesis, the work of the Thai Ombudsman will be analysed to explore the degree to which it is (a) designed to perform the traditional roles of the ombudsman and (b) the extent to which it has been successful in delivering those roles.

Before moving on, however, it is necessary to introduce another common feature of ombudsman analysis. For much as it is accepted that no two ombudsman schemes are the same, it is not just their core role that tends to be similar. In addition the institutional design of the office ordinarily follows some very predictable patterns. Building on this observation, several studies on the ombudsman institution, past and present, have identified a list of fundamental features and characteristics that are not just common to ombudsman schemes, but are deemed essential to the institution's unique role. Rowat, for instance, has identified the characteristics of an ombudsman as:

'(1) He is an independent and nonpartisan officer of the legislature, provided for in the constitution or by law, who supervises the administration; (2) he deals with specific complaints from the public against administrative injustice and maladministration; and (3) he has the power to investigate, criticize and publicize, but not to reverse, administrative action'.<sup>54</sup>

Seneviratne considered that the effectiveness of an ombudsman based on: (1) The ombudsman must be independent of executive and any partisan aspect of the constitution; (2) The ombudsman must have adequate powers of investigation and a jurisdictional coverage which is as wide as possible; (3) The ombudsman must ensure that there is effective remedy where administrative shortcomings are found; and (4) the ombudsman must be easily accessible; and (5) the ombudsman must be widely known.<sup>55</sup> Gregory stated similar criteria for evaluating the effectiveness of an ombudsman, including: impartiality and independence, visibility and access, wide jurisdictions and competence, extent of non-statutory practices and procedures speed,

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<sup>54</sup> Donald C Rowat, *The Ombudsman Plan*, *Essays on the Worldwide Spread of an Idea*, McClelland & Stewart, Toronto, 1973, p. 147.

<sup>55</sup> Mary Seneviratne, *Ombudsmen in the Public Sector*, Open University Press, Buckingham, 1994, pp. 13-14.



adequacy of remedial action secured, and effectiveness in obtaining compliance with recommendations.<sup>56</sup>

Perhaps the most famous of all studies in this area is that by Gottehrer, who compiled the *Ombudsman Legislative Reference Document*, which was based on a study of more than 130 laws creating ombudsman offices. In this work, Gottehrer identified what he referred to as the essential features of an ombudsman institution. Partly influenced by his work, various Ombudsman associations – e.g. the Ombudsman Association, the Australian and New Zealand Ombudsman Association,<sup>57</sup> the International Ombudsman Institute and the Asian Ombudsman Association - have developed membership documents along the lines outlined by Gottehrer. In particular, in 1969 the American Bar Association identified twelve essential characteristics which every statute or ordinance establishing an ombudsman in the United States should contain.

Although these various attempts to standardize the ombudsman model are not exactly the same, there is sufficient commonality to derive essential features of an ombudsman for the purposes of this study. This section, attempts to identify some of the best arrangements and practices that are universally recognized by academics and professionals as essential features of the ombudsman, for the purpose of establishing a framework for the review of the Thai Ombudsman scheme. What follows is drawn from the consensus that seems to be emerging, such as standards that refer to independence, impartiality, strong investigatory power, no enforcement power and access and public awareness and accountability.

These basic characteristics are in themselves not a determinative factor for success, as effectiveness of the ombudsman also depends on external factors which relate to the political and social context in which the ombudsman operates.<sup>58</sup> Nevertheless, they are usually considered as prerequisites to the existence of the ombudsman and therefore could serve as an important base set of criteria that an ombudsman institution should meet. At the end of each feature criteria boxes are developed to serve as a theoretical framework of the study.

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<sup>56</sup> Roy Gregory, 'Building and Ombudsman Scheme Statutory Provisions and Operating Practices', in Reif (ed.), *The International Ombudsman Anthology*, n. 9.

<sup>57</sup> The Ombudsman Association, the Australian and New Zealand Ombudsman Association, Rules and Criteria, December 2011.

<sup>58</sup> Roy Gregory and Philip Giddings, 'The Ombudsman Institution: Growth and Development', in Gregory and Giddings (eds.), *Righting Wrongs*, n. 1, p. 5.

### 3.2.1 Independence

Recognition of the importance attached to the issue of independence within the ombudsman community can be seen in the membership rules of ombudsman association. For instance, the Forum for Canadian Ombudsman states: ‘An ombudsman is an independent, objective investigator of people’s complaints against government agencies and other organisations, both public and private sectors...’<sup>59</sup>

This independence is also a prerequisite for the confidence that citizens must have in the ombudsman in his complaint handling role.<sup>60</sup> From the standpoint of the complainant, ombudsman schemes are different from many other complaint schemes (conciliation, compensation schemes) because ombudsmen are independent from the bodies they have power to investigate.<sup>61</sup> In this respect, Oosting explained that citizens must feel that they can trust the ombudsman to safeguard their interest, as they do in the court of law, in order to reduce fears of a backlash reprisal at the hand of public official they are complaining about.<sup>62</sup>

The IOA Code of Ethics, the basis for the Standards of Practice, says, ‘The ombudsman is independent in structure, function, and appearance.’<sup>63</sup> Establishing suitable arrangements to secure the independence of ombudsmen usually involves:

- constitutional protection
- institutional and functional independence
- funding and operational autonomy
- remuneration, security of tenure and removal of office

These will be explored in turn.

#### *Constitutional protection*

Among all the various constitutional watchdogs, the ombudsman is perhaps one of the most at risk of abolition or curtailment upon grounds of political expediency. This prospect of abolition has long been a fear in the ombudsman world.<sup>64</sup> One effective way to mitigate such risk is to enhance its legal status by

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<sup>59</sup> Forum of Canadian Ombudsman, 2006, ‘What is an Ombudsman?’, retrieved 23 January 2013, [http://www.ombudsmanforum.ca/whatis\\_e.asp](http://www.ombudsmanforum.ca/whatis_e.asp).

<sup>60</sup> National Consumer Council, Consumer Voice, July 1992,

<sup>61</sup> *ibid.*

<sup>62</sup> Marten Oosting, ‘Protecting the Integrity and Independence of the Ombudsman Institution: The Global Perspective’, in Reif (ed.), *The International Ombudsman Yearbook*, Vol. 5, n. 3.

<sup>63</sup> International Ombudsman Association, 2007, IOA Code of Ethics, retrieved 15 February 2014, [http://www.ombudsassociation.org/standards/Std Practice\\_1-07.pdf](http://www.ombudsassociation.org/standards/Std Practice_1-07.pdf).

<sup>64</sup> Pearce, ‘The Ombudsman Review and Preview the Importance of Being Different’, n. 4, p 77.

incorporating the institution in a constitution. Because the process for amending a constitution is often designed to prevent frequent amendments, any potential for abolition or revision by a disgruntled government could therefore be reduced. The ombudsman should be free to criticize without fear that the office will be abolished or unnecessarily restricted. Providing for the office in the constitution rather than solely in legislation, to some degree, removes the office from the political sphere and also elevate the profile of the ombudsman office. Constitutional underpinning has been encouraged by the Council of Europe. The Parliamentary Assembly of the Council of Europe resolved that establishment at constitutional level is essential for any institution of ombudsman to operate effectively.<sup>65</sup>

Valdes reported that structurally the great majority of the ombudsman in Europe and the commonwealth countries are based on constitutional or statutory foundation. The same claim can also be made in relation to the ombudsmen in the developing countries which are often formally instituted by the constitution.<sup>66</sup> Nevertheless, while increasingly ombudsman offices are being created through a constitutional instrument, there are well-established, high-quality ombudsman offices created solely by legislation in several countries.<sup>67</sup>

### ***Institutional and functional independence***

An independent test for the ombudsman is that it must not be subordinated to the body that they have power to investigate, especially the government or the executive branch.<sup>68</sup> Uggla cautioned that ‘if the ombudsman is powerful but lacks independence, there is a risk that in practice it becomes an instrument for achieving the political goals of other actors, while probably be of little service to the individual citizen or to the defence of human rights in general.’<sup>69</sup>

Institutional independence is achieved by arranging the ombudsman office in an external position in relation to the executive bodies that are subject to its scrutiny and also placing it in the machinery of state at a sufficiently high level.<sup>70</sup> Therefore

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<sup>65</sup> Recommendation 1615 of 2003, retrieved 12 March 2014, <http://assembly.coe.int/documents/adoptedtext/TA03/EREC1615.htm>.

<sup>66</sup> D de Asper y Valdes, 'The Self-Perceptions of the Ombudsman: A Comparative and Longitudinal Survey, in Reif (ed.), *The International Ombudsman Anthology*, n. 9, pp. 252-3.

<sup>67</sup> The National Democratic Institute for International Affairs (NDI), *The Role and Effectiveness of the Ombudsman Institution*, 2005.

<sup>68</sup> United Kingdom Ombudsman criteria adopted in March 1993.

<sup>69</sup> Uggla, n. 7, p. 428.

<sup>70</sup> Mohammad Waseem, 'Independence of Ombudsman', in Asian Development Bank, *Strengthening the Ombudsman Institutions in Asia*, n. 14, p. 32.

traditionally an ombudsman is typically a creature of the legislature. This helps provide the ombudsman with considerable independence and should facilitate investigation and reporting free from the interference of the executive branch of government. This point is confirmed by one leading piece of research which disclosed that all ombudsmen in the Scandinavian countries and the majority in the Commonwealth, European countries and the US are appointed by parliament.<sup>71</sup> A further step, taken in Papua New Guinea, is to separate the Office from Parliament— a structure relevant to the role the Commission has in relation to members of Parliament.

In Asia, however, in many countries ombudsmen are appointed by executive order appointments following a nomination process that does not involve parliamentary oversight. This difference in process from the norm in ombudsmandry poses a challenge to Asian ombudsmen. The risk is that an executive appointment ombudsman office, lacking effective parliamentary endorsement, will find it more difficult to earn credibility with all parties that will be affected by the office.<sup>72</sup>

Institutional independence also includes functional independence.<sup>73</sup> This means, for instance, that his *modus operandi* should not be subject to any hierarchical instructions. Parliament can and does make general rules or directives as guidelines but cannot otherwise interfere with his procedure. The functional independence of an ombudsman can also be measured by the extent of his discretion in an investigation process. Enabling legislation normally allows the ombudsman to determine the nature and extent of any inquiry or investigation. The ombudsman has discretion whether to initiate, continue or discontinue an investigation or to decide not to investigate a complaint lodged if he thinks the problem mentioned would have affected the individual only slightly. He must also be free to determine whether, when and how to employ publicity. This point is crucial, partly because by publicising the results of his work- in particular in annual and other reports-the ombudsman help promote the transparency in the government.

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<sup>71</sup> 70 % of the Commonwealth offices, 76 % of European countries and in 80 % of US Ombudsmen, see Valdes, n. 65, p. 253.

<sup>72</sup> John Robertson, 'Setting up an Ombudsman Office', *The International Ombudsman Yearbook*, Vol. 1, Kluwer Law International, The Hague, 1997, at 21.

<sup>73</sup> The World Bank, 'Using an ombudsman to oversee public officials', *PREMnotes*, number 19, April 1999, retrieved 30 May 2014, <http://www1.worldbank.org/prem/PREMnotes/premnote19.pdf>.

### ***Funding and administrative autonomy***

It is also important that the ombudsman has sufficient resources available to fulfil its functions properly. Budget arrangements can help ensure an ombudsman's independence. Experiences in many countries show that the funding for oversight bodies should not be left at the mercy of the government. Decisions on resource-allocation should be based on objective and expert analysis. The simplest approach is for the ombudsman to propose an annual budget directly to parliament, in a manner similar to that for courts and other vital institutions (such as the supreme audit institution).<sup>74</sup> It has been suggested that for transparency what constitutes sufficient resourcing should be determined by an appropriation committee of parliament in order to avoid excessive restrictions on funding which would affect the institution's ability to deliver what is expected of it.<sup>75</sup> Legislation covering the ombudsman ordinarily ensures autonomy in managing the resources provided by the budget.

### ***Remuneration, security of tenure and removal of office***

Legislation that creates the office commonly provides guarantees for personal independence such as security of fixed tenure specified by law and may only be removed from the office on grounds and procedures expressly specified by law. The majority hold the office for at least five or six years,<sup>76</sup> with longer terms lasting from seven to a maximum of ten years with or without the possibility of reappointment<sup>77</sup>.

Commonly, among the specified grounds for early removal of the office-holder are incapacity, incompetence, and criminal conviction, ineligibility to hold public office misconduct or becoming bankrupt. To legitimate the process and provide a safeguard against the danger of removing a good ombudsman, a common requirement is to require that premature removal be determined by the same form of majority vote as adopted for appointment of the ombudsman. Such a process reduces the possibility of an ombudsman being dismissed or suspended prematurely due to

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<sup>74</sup> *ibid.*

<sup>75</sup> Kayode Fayemi, 'Constitutional Governance and Institutions of Horizontal Accountability', presentation at the Senate Public Hearing on the review of the Independent Corrupt Practices Commission, Lagos, 6 March 2003, retrieved 3 March 2014, <http://www.slideshare.net/kayodefayemi/constitutional-governance-and-institutions-of-horizontal-accountability>.

<sup>76</sup> Valdes, n. 66, p. 210.

<sup>77</sup> For example, the Ombudsman in Ontario.

the arbitrary will of those who designated the ombudsman, as the investigating result may offend those who have political power or control the legislative body.

Legislation also confirms the salary and the status office-holder either by way of connecting the office to Parliament or, as is often the case, by linking the ombudsman's salary to that of a judge of the Supreme Court.<sup>78</sup> This arrangement is said to strengthen the ombudsman's personal stability and protect him against the danger of executive pressure by way of a reduction or increase of his income. Finally the ombudsman enjoys immunity from liability and criminal prosecution for acts performed under the law.<sup>79</sup>

These various issues of concern taken from international guidance suggest that the following areas need to be examined in relation to the independence and autonomy of the Thai Ombudsman scheme.

### ***Independence***

- *Is the Ombudsman created by the Constitution?*
- *Is the Ombudsman subject to control by the executive/governmental organs or state authorities?*
- *Does the constitution or the enabling legislation define the method of appointment and state clearly the term of appointment for the Ombudsman?*
- *Does the Ombudsman report to the legislature directly on the result of its operation or any specific matters resulting from an investigation?*
- *Is the Ombudsman free to select which complaints to pursue and methods for pursuing them?*
- *Is the Ombudsman free to make recommendation?*
- *Does the Office have its funds allocated directly from the legislature and is its budget funded at a level sufficient to carry out the functions of the Office?*
- *Does the Ombudsman have the sole power to run the office, appoint and remove staff?*
- *Does the Ombudsman have a fixed and long term of office?*
- *Does the Ombudsman have a high and fixed salary?*

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<sup>78</sup> For example, as in Denmark, ss. 12-13 of the Danish statute.

<sup>79</sup> D M Gottehrer, 'Fundamental Elements of An Effective Ombudsman Institution', article presented at a plenary session II: developing the working methods and tools of the ombudsman of the IOI Conference, Stockholm, 2010, retrieved 3 March 2014, <http://www.theioi.org/downloads/934ch/Stockholm%20Conference%20Plenary%20Session%20II%20Dear%20Gottehrer.pdf>.

- *Is the Ombudsman provided with immunity from liability and criminal prosecution for acts performed under the law?*

### 3.2.2 Impartiality

It is said that independence is the bedrock on which the other fundamental characteristics rest while impartiality helps the ombudsman earn respect and credibility from the people and the government.<sup>80</sup> Giddings noted that ‘Independence is not an end in itself. Its purpose is to secure impartiality in such a way as to re-assure those who might wish to use the services of the ombudsman office that they will receive a genuinely fair assessment of their case.’<sup>81</sup>

While independence connotes status and relationship, impartiality relates to an attitude or a state of mind that is unbiased and without prejudice towards a particular case or party.<sup>82</sup> It is therefore essential that an ombudsman must demonstrate that he is an impartial investigator by providing fair and objective treatment of people and the issues involved.<sup>83</sup> Caiden pointed out that ‘ombudsmen must be careful not to create popularity by being a citizen advocate or biased towards government.’<sup>84</sup>

Bakewell emphasised the impartiality of the office as a crucial factor. Ombudsmen must be ‘free of political consideration to speak freely and assess independently’, with its influence based on objectivity and prestige not political favour.<sup>85</sup> Because of the lack of enforcement power, it is the perception of being seen to be impartial which is key to the ombudsman’s findings and recommendations being implemented or administrative reform secured. The agency being reviewed is more likely to cooperate with an investigation when it can be encouraged that a process of third party objective review can provide reassurance that unfounded or unmeritorious complaints will be fairly treated. On the other hand criticism made by an ombudsman office perceived to be biased is likely to be rejected. An individual affected by administrative actions is more likely to turn to an ombudsman because he

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<sup>80</sup> *ibid.*

<sup>81</sup> Phillip Giddings, ‘The Parliamentary Ombudsman: A Classical Watchdog’, in Oonagh Gay & Barry K Winetrobe (eds.), *Parliament’s Watchdogs: At the Crossroads*, The Constitution Unit, University College London, 2008, p. 94.

<sup>82</sup> (1985) 2. *S.C.R Valiente v. The Queen* 673.

<sup>83</sup> IOA Standard of Practice, retrieved 20 March 2012,

<http://www.ombudsmanassociation.org/docs/BIOA-Rules-New-May2011-Schedule-1.pdf>.

<sup>84</sup> G E Caiden, ‘Public Administration and the Rise of the Ombudsman’, 5 *Politeia* 1, 1986.

<sup>85</sup> R D Bakewell, ‘The Ombudsman and Politics’, *Australian Journal of Public Administration*, Vol. XIV, No. 1, 1996, pp. 47-59.

believes that his case will be investigated by an objective third party.<sup>86</sup> Impartiality is an essential feature in both the ombudsman's roles as an administrative dispute settler and as an accountability mechanism, as is argued by the Council of Europe in 2003:

His/her duties are best discharged as an independent, impartial intermediary...An ombudsman ought to give the public in general the confidence that there is an impartial 'watchdog' holding government and public administration to account.<sup>87</sup>

Thus independence does not guarantee that an ombudsman will be impartial. In this context, impartiality is viewed as wider than independence; an ombudsman can be independent and yet be biased against one of the parties to the dispute. Legislation normally provides for measures to ensure that an ombudsman is perceived as impartial.

### ***The preservation of impartiality***

The impartiality of the ombudsman is primarily secured at the appointment and removal process. Personal qualifications are generally designed to select an ombudsman that can be widely respected. More importantly still, a selection process is required that ensures the appointment of an ombudsman that is a widely respected person and can be accepted by diverse political groups as unaligned and fair. Options may include processes such as appointment by a super majority in parliament, or a requirement that all the political parties within the legislature reach consensus on the person being appointed, or provision for a nominating committee to lead the process, together with an extensive consultation process. The removal process is designed to guarantee that the ombudsman will not be removed for political reasons or because the results of investigations have offended those in political power in the legislative body. Ombudsmen are subject to removal for specified causes or with the same super majority as appointment so as to ensure that the causes for removal are as widely appreciated and valid as those for appointment.

Once appointed, it is important that the ombudsman sustains his credibility and authority by ensuring that he continues to be seen to be impartial in his conduct

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<sup>86</sup> Marten Oosting, 'Protecting the Integrity and Independence of the Ombudsman Institution: the Global Perspective', in Reif, *The Ombudsman, Good Governance and the International Human Rights System*, n. 12; S E Aufrecht, 'The Ombudsman Office', *Public Administration and Public Policy*, Vol. 2, 2009, p. 136.

<sup>87</sup> Parliamentary Assembly of the Council of Europe, 'Strengthening the Institution of Ombudsman in Europe', Resolution 1959 (2013), Council of Europe, Strasbourg.



and in the way he performs his duties. General standards of practice of the ombudsman observed as indicators of impartiality include restrictions on activities that would compromise his neutrality or perceived as potential conflicts of interest.

Ombudsmen are normally restricted from being involved in any political activities. Ombudsman legislation tends to prohibit simultaneously holding public or elective office or from actively being involved in political parties' activities. The enabling law will also usually states how conflicts of interest will be handled, such as the adoption of a provision on whether an ombudsman is allowed to hold any other position concurrently, as well as procedures for handling possible conflicts of interest. For example, the Indian Ombudsman is barred from being a member of parliament, an office of trust or profit and a political party.<sup>88</sup> Likewise the Ombudsman Act of Alaska provides that the ombudsman cannot be a candidate for national, state or local until one year after leaving the office.<sup>89</sup>

In addition, to ensure impartiality the ombudsman should not hold additional positions in the office or enter into business or employment relationship that might lead to his ability to be impartial and fair to be called into question.

These various issues of concern suggest that the following areas need to be examined in relation to the impartiality of the Thai Ombudsman scheme.

#### ***Impartiality***

- *Are personal qualifications imposed to select an Ombudsman who is widely respected?*
- *Does the appointment process help to ensure that the person selected is widely viewed as fair and impartial?*
- *Are reasons for dismissal of the Ombudsman specified by law?*
- *Does the removal of the Ombudsman require a super majority?*
- *Is the ombudsman prohibited from simultaneously holding public office or being actively involved in political activities?*

### **3.2.3 Power**

Traditionally most ombudsmen cannot compel action or remedy to be provided nor can he impose sanctions on non-compliance of his recommendation.

<sup>88</sup> H H Kantharia, *Ombudsman: Indian Scenario*, paper presented at the 2<sup>nd</sup> Conference of the Asian Ombudsman Association, Seoul, 25–28 March, 1997, cited in Waseem, n. 67, p. 69.

<sup>89</sup> Gregory and Giddings, *Righting Wrongs*, n. 1, p. 61

Most ombudsmen can investigate, recommend, report to parliament and publicise reports of matters of public interest to secure results.<sup>90</sup>

### ***Power to investigate***

Ombudsmen are investigators. Most ombudsman legislation requires that the ombudsman conduct an investigation before making a recommendation. For example the Ombudsmen Act 1975 of New Zealand provides that '[h]aving completed an investigation, an Ombudsman may form an opinion that the decision, recommendation, act or omission: appears to have been contrary to law; or was based on a mistake of fact or law'. Ombudsmen's inquisitorial inquiries are aimed at establishing the fact of the cases he investigates and not just to focus on issues presented by the parties, in order to be able to decide authoritatively on the quality of the administrative action. Therefore extensive investigatory power is a prerequisite for the ombudsman in order to obtain information necessary for making a comprehensive evaluation on the exercise of public authority.<sup>91</sup>

An enhanced ability to access all relevant government documents together with a wide jurisdiction over all area of government administration is one of the most significant powers of the ombudsman and has been considered as one of the ombudsman's advantages over courts and parliamentarians.<sup>92</sup> Most ombudsmen can request from government officials all public or confidential information, records and documents necessary in the discharge of his duties, although the office is also ordinarily required not to disclose confidential information. Often an ombudsman is empowered to interview witnesses and apply for and conduct searches of premises where relevant information is believed to be located. In some jurisdictions the ombudsman can conduct on-the-spot inspections and investigations. Many ombudsmen, such as the ombudsman in Denmark, Norway and New Zealand, as well as AOA members, are specifically given the right to summon and enforce subpoena witnesses and documents and interrogate witnesses under oath.<sup>93</sup> Government bodies and government officials are under an obligation to reply to his queries and supply him with access to pertinent records with a narrow exception in the case where

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<sup>90</sup> Walter Gellhorn, 'Annotated Model Ombudsman Statue' in S V Anderson, A J Callaghan (ed.), *Ombudsman for American Government?*, Prentice Hall, Englewood Cliffs, NJ, 1968, p. 59; Reif, *The Ombudsman, Good Governance and the International Human Rights System*, n. 12, p. 19.

<sup>91</sup> Aufrecht, n. 86.

<sup>92</sup> Pearce, n. 4, p. 86.

<sup>93</sup> C A Sheppard, Ombudsman for Canada, 7 *Can. Bar Journal*, 1964, p. 179.

disclosure of such information would be injurious to public interest and prejudicial to the safety of the state.

The power to investigate does not always mean an obligation to investigate. There is often a discretion granted to an ombudsman to screen unworthy complaints. On the other hand, the power to undertake independent investigation on own initiative (*ex officio*) is considered important in identifying effective systemic shortcomings.

A few common sources of matters that can invoke an ombudsman to use his own initiative investigation include media reports, reports on government functions, political commentary, as well as broader issues that arise out of a set of complaints.<sup>94</sup> This power is cited as beneficial in the countries where the citizens do not know their rights and are susceptible to abuse of power by government and the ombudsman can intervene to investigate corruption and maladministration whether there is a complaint or not.<sup>95</sup> The chief danger here is that inappropriate use of the own initiative investigatory power could expose the ombudsman to investigating issues purely because they were in the media spotlight. However the counter argument against this concern is that possessing such power is important if the ombudsman wants to be well-positioned to play a part in scrutinising the executive.<sup>96</sup>

These are all issues which need to be examined in relation to the Thai Ombudsman scheme and suggest the following as important areas of inquiry.

***Power to investigate***

- *Does the legislation provide the Ombudsman with the right to require all relevant information, documents and other materials from those subject to investigation?*
- *Can the Ombudsman access all the public records necessary for an investigation?*
- *Is the Ombudsman able to investigate regardless of complaints where required in the public interest?*

<sup>94</sup> M McAleer, 'Working out Initiative Investigation', *The Ombudsman*, Ombudsman Association, May 2013, Issue 49, p. 28, retrieved 12 June 2014, <http://www.ombudsmanassociation.org/theombudsman/49.pdf>.

<sup>95</sup> For example the Ombudsman institution in Uganda and Zimbabwe cited in John Hatchard, 'Developing Governmental Accountability: The Role of the Ombudsman', *Third World Legal Studies*, Vol. 11, Article 9, 1992.

<sup>96</sup> Richard Kirkham, 'The Parliamentary Ombudsman: Withstanding the test of time. Parliamentary and Health Service Ombudsman', House of Commons Paper: HC 421 of 2006-07, London, 2007.

- *Does the agency subject to the investigation have a corresponding duty to cooperate with or respond affirmatively to the Ombudsman's reasonable request of evidence related to the case?*
- *Have there ever been any problems in using these powers?*

### ***Power to report***

The ombudsman is provided with power to recommend but not the power to enforce his recommendations. The ombudsman must persuade the government agencies to accept his finding and implement his recommendation. The persuasive power of the ombudsman's recommendation is believed to come from the comprehensive investigation of a case carried out in a neutral and impartial manner, supported by the quality of the findings, the practicality and reasonableness of his report and also the credibility and respect inherent in the office. Without official collaboration, the ombudsman effort may have little influence. In order to maximise their impact, ombudsmen in general are found to put in a considerable amount of work in raising their public profile and cultivating strong complementary working relationships with the public sector.<sup>97</sup>

In principle, government is expected to act on ombudsman recommendations because it is what people expect. In rejecting an ombudsman recommendation government needs to give justification for their rejection, otherwise governments will be seen to be acting as a judge in its own case and as rejecting the need for checks and balances within the constitution. In *Ainsworth v Ombudsman*, Justice Enderby of the New South Wales Supreme Court said:

It has always been considered that the efficacy of the [the Ombudsman] Office and function comes largely from the light [he] is able to throw on areas where there is alleged to be administrative injustice and where other remedies of the Courts and the good offices of Members of Parliament have proved inadequate. Goodwill is essential. When intervention by an Ombudsman is successful, remedial steps are taken, not because orders are made that they may be taken, but because the weight of its findings and the prestige of the office demand that they be taken.<sup>98</sup>

### ***Report to parliament***

Public bodies do not always agree with the ombudsman's findings and may refuse to adopt their recommendations. When this occurs, to resolve the dispute, ombudsmen need to be able to rely upon the political pressure they can create on the

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<sup>97</sup> McMillian, n. 4.

<sup>98</sup> (1988) 17 NSWLR 276, 283.

government by submitting a formal report to parliament and making their findings publicly available, or a method of equivalent effectiveness. This is an addition to the mandatory annual report submission to parliament, in which ombudsmen may draw attention to cases in which public agencies have failed to implement their recommendation. The ombudsman's strength arguably rests with its close relationship with the legislature.<sup>99</sup> The parliamentary route is often advocated as a strong tool because of its powerful place in the constitution. Given the opportunity, Parliament can invest time in exploring the matter and providing its opinion on the affair. Parliamentary support and scrutiny is often considered essential to the ombudsman's legitimacy and effectiveness.<sup>100</sup> As one former Ombudsman observed:

There is little doubt that the right of an Ombudsman to submit special reports to his legislature constitutes a powerful instrument. Even if it is never used by the Ombudsman, the potential of its user may be employed as a successful strategy to win compliance with recommendation.<sup>101</sup>

The UK's PCA's *Sachenhausen* has been cited as a good example of how parliamentary support is valuable in bringing pressure on the government when departments raised difficulties in implementing its recommendation.<sup>102</sup> It has been stated that government departments are reluctant to ignore the PCA's recommendation because of the fact that the PCA can command parliamentary support.<sup>103</sup>

It is, therefore, widely suggested that the success of the office of the ombudsman heavily depends on strong parliamentary support. Parliament is supposed to on a regular basis carefully and thoroughly examine and debate the findings and recommendations presented in the ombudsman's annual and other reports, and then to take appropriate actions or measures. Such support or ideally corporation between the ombudsman and the legislature is crucial and key to its effectiveness.<sup>104</sup> On the contrary, experiences of ombudsmen around the world

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<sup>99</sup> Buck et al., n. 50, pp. 155-156.

<sup>100</sup> The World Bank, n. 69.

<sup>101</sup> K Friedmann, 'Realisation of Ombudsman's Recommendations', papers presented at the 4<sup>th</sup> International Conference, Commonwealth Ombudsman, Canberra, 1989, at 123-124.

<sup>102</sup> Richard Kirkham, Brian Thompson, Trevor Buck, 'When putting things right goes wrong: enforcing the recommendations of the ombudsman', *Public Law*, 2008, at 513.

<sup>103</sup> *ibid.*

<sup>104</sup> Discussion see Robert Runciman, 'Ombudsmen and Legislatures: Allies or Adversaries?', *Canadian Parliamentary Review*, Vol.7(3), 1984, p.16.

suggest that problems with the effectiveness of ombudsmen in many developing countries can be attributed largely to failure of parliament to debate and take action on any of their annual or special reports.<sup>105</sup> Today the best parliamentary practice for the ombudsman report to the democratic assembly is through a standing committee or in some jurisdictions a special committee is designated to engage with the ombudsman. For example, in the UK and Ireland, there are select committees which are responsible for receiving and debating the ombudsman's annual and special reports and for ensuring that its criticisms and recommendations are acted upon.

### ***Report to the public***

In case of lack of political support, the possibility of making known on a large scale his findings is another main weapon the ombudsman possesses.<sup>106</sup> Around the world, in such cases, recommendations are often (not always) adopted by government, albeit sometimes following wide and intense public discussion on unfair and inappropriate actions or policies cited in the ombudsman report.<sup>107</sup> Therefore, it has been cited by several ombudsman that it is crucial that ombudsman institutions are able to issue public reports at the time and manner they see fit, which means the reports are not censored, 'sanitized' or delayed by the executive or the bodies which they oversee.<sup>108</sup>

The press can play a very significant role in strengthening the office of the Ombudsman. It could help the ombudsman increase visibility and can arouse considerable public attention by regularly publishing and commenting on the ombudsman's findings and recommendations, on the response of Parliament to the ombudsman's reports, on the response of the government and of the public bodies concerned, and on subsequent developments and changes.<sup>109</sup> In general, the media is interested in the works of the ombudsman in order to monitor its works while the

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<sup>105</sup> Najmul Abedin, 'The Ombudsman in developing democracies: the Commonwealth Caribbean experience', *International Journal of Public Sector Management*, Vol. 23 No. 3, 2010, pp. 221-253.

<sup>106</sup> Marten Oosting, 'The Ombudsman and His Environment: A Global View, in Reif (ed.) *The International Ombudsman Anthology*, n.9, pp. 1-13.

<sup>107</sup> K Friedmann, n. 101, at 123-124.

<sup>108</sup> H Born, A Wills and B S Buckland, *A Comparative Perspective of Ombudsman Institutions for the Armed Forces*, Geneva Centre for the Democratic Control of Armed Forces (DCAF) Policy Paper - No 34, 2013, p. 17.

<sup>109</sup> T Munroe, 'The Ombudsman and Parliament', paper presented at the Third Regional Conference of the Caribbean Ombudsman Association (CAROA), Runaway Bay, 2004, p. 5.

general public pay attention because the emphatic public feel that what happened in the cases can happen to them too.<sup>110</sup>

The Irish, German, Estonian, UK, and Slovenian ombudsman institutions all cited that they have power to publicise their reports in the event of non-compliance or non-implementation, while the Serbian ombudsman may even publicly recommend the removal of the relevant official.<sup>111</sup> It is broadly agreed in the literature that publicity may force an agency to action. In Latin America, ombudsmen are found to employ publicity more often to secure change, as they can be faced with hostile responses from government.<sup>112</sup> This has proven to be an effective tool. As pointed out by Uggle, one source from the Peru's ombudsman office remarked that the government did not want to defy the ombudsmen as this would result in a political cost.<sup>113</sup>

The ombudsman's ability to secure compliance and influence therefore depends significantly on the good will and cooperation from the executive/administrative branch, and on the second place support from parliament and eventually the public and favourable media coverage.

A number of ombudsmen have claimed that the prestige and the publicity surrounding the office is more than enough to secure the desired effect without further sanctions.<sup>114</sup> However, the extent to which persuasion is an effective means of inducing compliance varies from jurisdiction to jurisdiction. Individual grievances do not always attract public interest. In such cases, it may not be practical to address the issue for political pressure through the legislative or appeal for public opinion. And this raises questions as to the usefulness of the institution. In certain circumstances, therefore, there may be strong arguments for considering additional coercive measures, where non-compliance is an offence, to ensure that

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<sup>110</sup> Oosting, n.106, pp.1-13.

<sup>111</sup> Born et al., n. 108, p. 14.

<sup>112</sup> Uggle, n. 7, p. 428

<sup>113</sup> id., p. 439.

<sup>114</sup> It is reported that implementation rate varies from nearly 100 percent in Serbia, Sweden, Norway, Slovenia, Finland, and Estonia to 71 percent in Canada; 70 percent in the Netherlands and Germany; and 60 percent in Poland, see Horn et al., n.103, p. 13; In the UK, it has been reported that public authorities implement in excess of 99% of the recommendations of the ombudsmen in the UK, cited in Richard Kirkham, Brian Thompson, Trevor Buck, 'Putting the Ombudsman into Constitutional Context', *Parliamentary Affairs*, Vol. 62 (4), 2009, pp. 600-617; The South Australia ombudsman reported that over 97 % of his recommendations were accepted across all agencies, see 'A report on the implementation of the Ombudsman's recommendations by agencies for the period 1 July 2009 to 31 March 2013', retrieved 5 July 2014, <http://www.ombudsman.sa.gov.au/wp-content/uploads/Putting-it-right.pdf>.

recommendations are adhered to, or at least considered. In addition, it has been argued that ignorance of the ombudsman's recommendations could adversely affect his performance and cause the ombudsman to become demoralized.<sup>115</sup>

Despite the dangers, however, scholars and experienced ombudsmen have frequently argued against specific legal enforcement powers.<sup>116</sup> The contrary position has often been claimed that the lack of enforcement power is strength of the ombudsman not weakness because it means that the office does not usurp or compete with the legislature and the executive, or become another court. When combined with other factors than merely the power to make legal binding decision, what seems to be a weakness enables the ombudsman to exert its influence to supplement and broaden the traditional means of control.<sup>117</sup> To give the ombudsman direct enforcement power would result in the institution becoming more like other traditional mechanisms that are already in place, while in practice the traditional ombudsman model can be an effective means of redress where other means have failed.

It may be that the inability to force change is the central strength of the office and not the weakness. It requires that a recommendation must be based on a thorough investigation of all facts, scrupulous consideration of all perspectives and vigorous analysis of all issues. Through this application of reason the results is definitely more powerful represent .....it changes the way of thinking.<sup>118</sup>

### ***Monitoring implementation***

Adequate follow up on implementation of recommendations forms a critical part of an ombudsman's functions as it impacts the ombudsman's institutional effectiveness. It is suggested that ombudsman offices have a process in place to proactively follow up on the implementation of recommendations, instead of passively relying largely on feedback from the complainant and working on the assumption that if a complainant does not approach the ombudsman, the grievance

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<sup>115</sup> E Dobjani, 'The Establishment and Operation of the People's Advocate: the Ombudsman in Albania', in Linda C Reif *The International Ombudsman Yearbook*, Vol. 6, Martinus Nijhoff, Leiden, 2002.

<sup>116</sup> Richard Kirkham, 'Explaining the lack of enforcement power possessed by the ombudsman', *Journal of Social Welfare and Family Law*, 30:3, 2008, at 253-263.

<sup>117</sup> H H Kirchheiner, 'The Ideological Foundation of the Ombudsman Institution' in Reif, (ed.), *The International Ombudsman Anthology*, n. 9; Daniel Jacoby, 'The Future of the Ombudsman', in Reif (ed.), *The International Ombudsman Anthology*, n. 9, at 21; Oosting, n.106, at 10.

<sup>118</sup> Owen, n. 17, at 52.



would have been redressed.<sup>119</sup> It is argued that while this may be a reasonable assumption, it may still leave out a number of complainants who do not get the required relief and are hesitant to approach the ombudsman again.<sup>120</sup> Besides it is worth pointing out that it is not just the non - implementation of recommendation, but the timeliness of the implementation which is the issue. Effectiveness in monitoring the implementation of recommendations is one of the criteria that ombudsman offices have developed or adopted as measures of performance.<sup>121</sup>

A study reported that the effectiveness of the monitoring techniques is likely to affect the number of recommendations that are successfully implemented by public bodies concerned.<sup>122</sup> Monitoring techniques employed included site visits; follow-up discussions with public officials and complainants; arrange follow-up meetings with ministers to pose questions on the implementation of their recommendations departments,<sup>123</sup> legislative arrangement that require agencies to report to the office at specific intervals on their progress in implementing recommendations;<sup>124</sup> or a requirement that the ombudsman reports on non-compliance on an annual basis.

To explore these points, in examining the effectiveness of the Thai Ombudsman's powers, in this work the following questions will be tested.

***Power to report***

- *Is there an expectation that the Ombudsman's recommendation be implemented?*
- *Can the Ombudsman report non-compliance to a hierarchically superior individual or body?*
- *Can the Ombudsman report non-implementation to parliament?*
- *Can the Ombudsman publicise non-compliance?*
- *Does the Ombudsman have effective monitoring techniques to follow up the implementation of its recommendation?*

<sup>119</sup> Aftab Raja, 'Measures for Removal of Constraints in Implementation of Ombudsman's Decisions/ Recommendations', retrieved 18 June 2014, <http://asianombudsman.com/ORC/MemberResearchStudies/short%20studies-Director%20Implementationrev1.pdf>.

<sup>120</sup> *ibid.*

<sup>121</sup> Marin and Jones, n. 47, pp. 191-233.

<sup>122</sup> Born et al., n 103.

<sup>123</sup> *ibid.*

<sup>124</sup> Marin and Jones, n. 47, p. 225.

### 3.2.4 Fairness

Fairness is one of the criteria to be met by all ombudsman offices.<sup>125</sup> In fact, it is the essence of the ombudsman process which aims to ensure that the complainants as well as the government agencies concerned are treated fairly. In order that the ombudsman arrives at decisions that are fair and seen to be fair,<sup>126</sup> the ombudsman is normally required to observe the principles of procedural fairness. Fairness can be explained as the requirement to make decisions on the information before it and by having specific criteria upon which its decisions are based.<sup>127</sup>

Most ombudsman statutes require the ombudsman to be procedurally fair to those whom her report may affect adversely. For example, the ombudsman is required to advise the complainants of the reasons why a complaint will not be investigated or not supported or is outside jurisdiction, or is otherwise excluded. Such exercises may be done in writing or verbally and may have time periods imposed in order that there is no unnecessary delay in the process.

Various design features set by ombudsman association such as USOA, IOA, and IOI are often embedded fairness in the internal operational arrangements of an ombudsman scheme. By way of example, ANZOA requirements for fairness reflect fundamentals such as the ombudsman's investigatory process normally requires that before announcing a conclusion or recommendation, the agency criticized should be consulted first and also given an opportunity to respond to the findings and recommendations. The importance of the concept of fairness is that reports are more accurate and criticism made is more easily accepted if the agency concerned or people being criticized have an opportunity to know what the criticism will be before it is made public.

Good practice in ombudsmanry often provides both parties the opportunity to rebut the arguments of, and information provided by, the other party and allow for a review of any decision or conclusion the ombudsman has reached about the complaint. Sometimes bodies investigated against are given the opportunity to include their reply in the final report.<sup>128</sup> The rationale behind this practice is that

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<sup>125</sup> Rules and Criteria, ANZOA, December 2011.

<sup>126</sup> M Zacks, 'Administrative Fairness in the Investigative Process', in Reif, (ed.), *The International Ombudsman Anthology*, n. 9.

<sup>127</sup> ANZOA, n. 123.

<sup>128</sup> USOA, Governmental Ombudsman Standards, for example: Act 204 of 1994 § 722.930 The Children's Ombudsman Act provides that 'Before announcing a conclusion or recommendation that expressly or by implication criticizes an individual, the department, or a child placing agency, the

government bodies which are subjected to the ombudsman's investigation should be entitled to administrative fairness from the ombudsman, as is the case for the citizen from the government.

Established ombudsman offices' websites e.g. ombudsmen in Canada, Australia, Hong Kong, England, and the USA delineate clear commitments that focus on fairness and show common attributes when it comes to sound principles and best practices concerning fairness. Based on the review of the literature and the ombudsman offices' website, a handful of checklists about the ombudsman's fairness were extracted as follows.

***Fairness***

- *Are the complainants advised of the reasons why the Ombudsman decide not to investigate, cease to investigate the complaint or consider the complaint outside jurisdiction?*
- *Are respective parties provided with an opportunity to present their arguments and evidence?*

### **3.2.5 Accessibility and public awareness**

Accessibility is another requirement for an ombudsman's effectiveness.<sup>129</sup> As a complaint handling body, an ombudsman generally serves as an office of last resort for those who have tried unsuccessfully resolving their grievance with the agency complained against. On the other hand, an ombudsman's task is to assist the policy makers in supervising the administration of public policies, comment upon how they are being administered and recommend changes where appropriate. In this regard, for an ombudsman to be useful for complainants and to be effective in passing on bottom-up administrative lessons to policy makers, it is important that the ombudsman office is accessible for any person making a complaint.<sup>130</sup> Arguably, it is its accessibility to the common citizen that differentiates the ombudsman from the

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ombudsman shall consult with that individual, the department, or the child placing agency. When publishing an opinion adverse to the department or child placing agency, the ombudsman shall include in the publication any statement of reasonable length made to the ombudsman by the department or child placing agency in defense or mitigation of the action.'

<sup>129</sup> Seneviratne, *Ombudsmen in the Public Sector*, n. 54, p. 14.

<sup>130</sup> This is important if the complaints the ombudsman receives are to be viewed as representative for what goes wrong with public administration, see Steven Van Roosbroek, 'The Ombudsman and the Citizen: and Challenge of Some Commonly held Assumptions', report present at EFMD conference on Public Sector Management Development 14 - 16 June 2006, Aix-en-Provence, p. 4, retrieved 18 June 2014, <https://lirias.kuleuven.be/bitstream/123456789/82748/1/Paper+EFMD+Steven+Van+Roosbroek.pdf>.

court system. Accessibility is made up of at least two components: awareness and availability.

Promoting public awareness of the ombudsman's existence and a wide understanding of the activities of the office is important because prospective users need to know that there is an ombudsman first and then how it can help. This can be dealt with through strategies such as public education, speaking engagements, advertising campaigns, press conferences, partnerships with civil society, media coverage and the circulation of informational materials (i.e. pamphlets, guides, brochures, annual reports, bulletins, etc.) to raise awareness about the institution. A problem in developing countries is that the institution is frequently not well known in rural areas.

Ideally, the ombudsman's activities should be covered by media television and radio, newspapers, press conferences, leaflets, annual reports, and bulletins. Ombudsmen are increasingly making use of the various new media tools available e.g. the Federal Tax Ombudsman in Pakistan has a very active Facebook page, while the Ontario Ombudsman has been assiduous in developing its Twitter profile. The Ontario Ombudsman has launched a mobile version of the office's website which will allow mobile users to browse the Office's website more quickly and efficiently and file an online complaint from their mobile devices.

The ombudsman must make himself readily available to people with complaints. McMillan states that a key reason for the success of ombudsmen around the globe is that they have 'made themselves available to the members of the community they serve'.<sup>131</sup> Most ombudsmen have facilitated convenient access e.g. complaints can be made through telephone calls or website. The ombudsman service is free. In countries with a large population or poor communication facilities, there is a need to find a means to establish clearly established and signposted provincial or district offices, or arranging for regular regional visits. The Gibraltar Public Services Ombudsman Office's employment of Skype facilities to users provides an example of how modern technology can be used to enhance accessibility to the ombudsman's service.

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<sup>131</sup> McMillan, 'Key features and strengths of the Ombudsman model', n. 6.

In accordance with this analysis various proposed tests of access and public awareness are set below, as they will be applied in this study of the Thai Ombudsman.

***Access and Public awareness***

- *Can anyone bring a complaint directly to the Ombudsman without paying a fee or passing through an intermediary office?*
- *Can a complaint be lodged verbally or via internet?*
- *Is the institution accessible to all citizens?*
- *Are there barriers to accessibility?*
- *How does the citizen find out about the Office?*
- *Does the Office provide for an easy procedure by which to complain?*
- *What does the law say about accessibility?*
- *To what extent does the Ombudsman use electronic technology to aid the process?*
- *Has the Ombudsman employed all reasonable measures to make the general public aware of its existence and role?*

### **3.2.6 Accountability**

An organization that uses the power of the state must be checked. Ombudsmen possess extensive investigatory power and considerable discretionary power. The court can apply judicial review which focuses on the legality of the ombudsman's procedure, not the merit of its decision. Therefore there is a need to provide adequate processes of external oversight to ensure that these powers are exercised appropriately, as well as to assure the effectiveness of the office.<sup>132</sup> In addition ombudsmen should be seen to be responsible and accountable for their decisions and actions, including the stewardship of public funds, in order to ensure public confidence in the scheme and secure its long-term legitimacy.<sup>133</sup>

It is widely accepted that the legislature is the most appropriate institution to oversee the ombudsman for three main reasons: firstly, in a democracy parliament is a pluralistic institution unlikely to be captured by a narrow point of view; and secondly, there is a natural link between the ombudsman and parliament as the work of the ombudsman, as a watchdog and grievance handling complements to the work of parliament; and thirdly, a widely adopted model designed for ensuring the

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<sup>132</sup> Buck et al., n. 50, p. 170.

<sup>133</sup> id., pp. 170-186.

ombudsman's independence and legitimacy dictates that the ombudsman should be free from other control, except for responsible to the legislature as its appointing authority.<sup>134</sup> It should be noted that some ombudsmen who are not parliamentary appointed also submit their annual report to parliament.<sup>135</sup>

### ***Parliament scrutiny***

While it is suggested that full accountability of an ombudsman requires the combined impact of a variety of processes, fundamental to the accountability of ombudsman schemes is the regular oversight of Parliament.<sup>136</sup> Parliamentary scrutiny of the ombudsman normally involves issues relating to its performance, such as an evaluation of its effectiveness, whether it has achieved its objectives, plan and budget. Unlike the court, parliament can consider the appropriateness of the role of the ombudsman, criticize the drawback and advise on the improvement. Arrangements for interaction between the ombudsman and parliament vary across countries.<sup>137</sup> Parliament exerts its will through budget cut, removal and reappointment.

At minimum, an ombudsman office normally has a legal obligation to submit an annual report to the legislature, which is then made available to the public. The ombudsman is required to publish a detailed and informative annual report containing specific statistical and other data about the performance of the scheme, including: information about how the scheme works; statistics on complaints handled and their outcome; explanation of the way complaints have been handled

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<sup>134</sup> id., pp. 155-160; the American Bar Association, Standards for the Establishments and Operation of Ombuds Offices, February, 2004, p. 6, retrieved 18 June 2014, <http://www.americanbar.org/content/dam/aba/migrated/leadership/2004/dj/115.authcheckdam.pdf>.

<sup>135</sup> For example, the executive Ombudsman in Papua New Guinea and the Local Government Ombudsman in England.

<sup>136</sup> Richard Thomas, Jim Martin, Richard Kirkham, *External Evaluation of the Local Government Ombudsman in England*, 2013, pp. 68, 70-73, retrieved 25 October 2014, <http://www.lgo.org.uk/GetAsset.aspx?id=fAAxADcANwA3AHwAfABUAHIAQBIAHwAfAAwAHwA0>.

<sup>137</sup> Emily O'Reilly, 'Relations between Ombudsmen and Parliaments', speech at the 8<sup>th</sup> national seminar of the European Network of Ombudsmen, 21st October 2011, Copenhagen, Denmark. She cited notable information obtained from her survey such as the Office of the Ombudsman of the Czech Republic appears before parliament 10 -15 times annually compared to the majority of one and three time annually. The Czech Republic Ombudsman submits reports every three months to the Chamber of Deputies on his/her activities. In Slovenia, the Ombudsman is entitled to request the President of Parliament, the Prime Minister and Ministers to grant an audience to the Ombudsman within 48 hours while the Portugal Ombudsman can request Parliament to discuss any issue of concern to his/her Office. Most of respondents report to a designated committee of parliament with some have written terms of reference governing interactions between the committee and the ombudsman, retrieved 10 July 2014, <http://www.ombudsman.gov.ie/en/news/speeches-articles/2011/relations-between-ombudsmen-and-parliaments1.html>.

(including the arrangements for quality-control i.e. the time taken to resolve complaints); examples of outstanding case; and description of any systemic and emerging issues.<sup>138</sup>

The legislative assembly reviews the report of the ombudsman, examines strategy and the operation of the office and may inquire into a matter which the ombudsman has brought to its attention. Reporting can be made through a standing committee or in some jurisdiction special committee designated to engage with the ombudsman is established.<sup>139</sup>

In examining the accountability arrangement of the Thai ombudsman in this work the following questions will be tested.

#### ***Accountability***

- *Is the Ombudsman required to report to the legislature directly and regularly on the result of its operation or any specific matters resulting from an investigation?*
- *Does parliament allocate budget for the Ombudsman?*
- *Is the Ombudsman required to report regularly to parliament?*
- *Is the Ombudsman required to publish an annual report?*

### **3.3 Conclusion**

This chapter explored the traditional role of the ombudsman which is the provision of administrative justice. The traditional role primarily involves receiving and investigating complaints from members of the public against government agencies and systemic investigations to address issues which potentially affect many complainants rather than an individual complainant, with an aim to improve administrative practice. In light of the reality that there will always be an element of administrative error in the carrying out state functions, the redress of grievances caused by administration would likely to be needed in all societies. Further, as the control of administrative conduct by existing institutions – the court, the legislature and the executives - is not sufficient, this description of the traditional role will almost certainly remain the core role of ombudsman schemes around the world.

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<sup>138</sup> ANZOA, n. 123; and Ombudsman Association ‘Accountability’, About Ombudsmen, retrieved 3 July 2014, <http://www.ombudsmanassociation.org/about-accountability.php>.

<sup>139</sup> For example the Legal, Constitutional and Administrative Review Committee (LCARC) of the Queensland Parliament must be consulted about the Ombudsman’s suspension, termination, budget; and strategic review of the Ombudsman’s office, see The Parliamentary Commissioner Act 1974.

This chapter also studied a number of features that are widely established that an ombudsman scheme should possess to function effectively. An ombudsman depends on the power of persuasion rather than enforcement which allows it to complement well as an accountability mechanism. Further, the claim was made that in order for an ombudsman, using the power of persuasion, to be effective, it must possess a number of essential features which help the office earn the credibility, induce trust and respect from both individuals and the government. These features are related to its institutional design, as well as principles of function, namely broad power of investigation, independence, impartiality, accessibility and public awareness, fairness and accountability.

However, many ombudsman offices are subject to increasingly differentiated functions. Ombudsmen are now discharging functions which relate to, or are essentially different from the traditional ombudsman function of oversight of public administrative acts through complaint handling. This development has resulted in an ongoing discussion among ombudsmen and scholars with regards to the evolving roles of the ombudsman and the compatibility of its new roles to its essential features and its traditional duties.

The Thai Ombudsman is an example of an ombudsman with evolving roles. Originally established in line with the traditional role and features of the standard ombudsman model - an independent legislative agency with general jurisdiction over all administrative agencies - it was subsequently entrusted with a number of additional responsibilities and now operates beyond the traditional area of administrative malpractice. Ongoing discussion concerns the performance of the Office, and has been directed mainly towards whether the new functions undertaken by the Office are compatible with its essential institutional features designed for the effective operation of the traditional roles originally assigned to it.

In order to answer this question, the second part of the thesis will study the establishment of the Thai Ombudsman, its legislative framework and institutional design and the constitutional roles assigned to it. These issues will be discussed using the framework of the ombudsman role and essential features identified in this chapter. However before examining the Thai scheme, the study will need to look more at other ombudsman schemes and their additional roles.



## Chapter 4

### The expanded roles of the modern ombudsman

The traditional core functions of a classical ombudsman and the favoured institutional design and essential features that should accompany the performance of the ombudsman's core role have been discussed in Chapter 3. However the ombudsman institution is an evolving one. Today, in addition to the investigation of poor government decision making, newly established ombudsman offices, as well as older offices, have assumed multiple mandates. These mandates often include roles that were not typically part of the traditional portfolios of the first generation of ombudsman schemes which were largely focused on monitoring legality and fairness in public administration. This chapter now focuses on the other roles which have been given to the ombudsman over the years.

The traditional role seems to have gained wide acceptance within academic, practitioner, governance and political circles, and arguably amongst the general public as well, insofar as it is accepted as an appropriate concept or model with which to review and identify administrative wrongs in bureaucratic decision-making.<sup>1</sup> By contrast, there is some debate on whether the Ombudsman can be effective with the new roles it has been given. As McMillan has stated: '[t]hough growth and expansion are important, it is equally important that Ombudsman offices do not take on inappropriate functions.'<sup>2</sup> The aim of this chapter is to outline recent developments of the classical ombudsman, in terms of the new mandates given to the office, as additional functions have been asked of it in many parts of the world.<sup>3</sup> It

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<sup>1</sup> John Robertson, 'The Ombudsman Around the World', *The International Ombudsman Journal*, Vol. 2, 1998, pp. 112–128; Brian Elwood, 'How to harmonize general ombudsman activities with those related to specialized ombudsman', *The International Ombudsman Yearbook*, Vol. 2, 1998, Kluwer Law International; International Ombudsman Institute, The Hague, 1999, p. 198.

<sup>2</sup> John McMillan, 'The expanding Ombudsman Role: What fits? What doesn't?', presentation to Australia Pacific Ombudsman Region meeting in Melbourne on 27 March 2008, retrieved 15 November 2013,

[http://www.ombudsman.gov.au/files/27\\_March\\_2008\\_The\\_expanding\\_Ombudsman\\_role\\_What\\_fits\\_What\\_doesnt.pdf](http://www.ombudsman.gov.au/files/27_March_2008_The_expanding_Ombudsman_role_What_fits_What_doesnt.pdf).

<sup>3</sup> The study, therefore, does not include specialised ombudsman which do not have administrative justice function.

also examines the implications of the combined mandates of the traditional and the new model. Section 4.1 examines various reasons for additional functions being given to ombudsman schemes. It contends that the development is largely a positive one. Section 4.2 examines the new powers that can accompany the new roles, powers that in themselves can alter the nature of the ombudsman office. Section 4.3 offers an evaluation of the expansion of role of the ombudsman. The chapter draws on existing literature on various experiences of ombudsman schemes around the world and upon the array of previous studies that have extensively dealt with issues surrounding their jurisdiction. Section 4.4 then explores what have been identified as the difficulties, dangers or challenges associated with performing the additional functions. Section 4.5 concludes the chapter.

As this chapter will argue, this exercise is relevant to the thesis as the Thai Ombudsman is one of the latest examples of an ombudsman scheme that has evolved well beyond the traditional model. As the thesis will go on to argue, this point is made in particular relation to Thailand where the Ombudsman office has struggled in performing its function to full success for the last twelve years, with the result that there has been an adverse effect on the Ombudsman's effectiveness in performing its core operations. As pointed out by Pearce, '[w]hat this role should be can be informed by looking at what has been done with the fledging institution up until now, noting success and failure and thereby pointing the way to the future'.<sup>4</sup> The findings of this chapter will form a basis for various conclusions, about the Thai Ombudsman and the ombudsman enterprise generally, that will be laid down in Chapter 9.

In relation to the previous chapter, this chapter will contend that the expansion of the roles of the ombudsman beyond the traditional core can be justified and explained within the analytical framework developed in Chapter 3. That is, an ombudsman is used to fill in the accountability gaps of the constitution which are not sufficiently covered by other mechanisms. Further this chapter adds emphasis to the importance of favoured institutional design and essential features that should accompany the performance of the ombudsman's core role which was discussed in chapter 3, by arguing that the ombudsman should retain its essential features and core roles while adjusting to different functions as needed by context.

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<sup>4</sup> Dennis Pearce, 'The Commonwealth Ombudsman: Present Operation and Future Developments', Papers on Parliament No. 7, March 1990, retrieved 15 November 2013, [http://www.aph.gov.au/About\\_Parliament/Senate/Research\\_and\\_Education/~/\\_/link.aspx?id=6D5134E956DA415B977A17D6D01FC658&z=z](http://www.aph.gov.au/About_Parliament/Senate/Research_and_Education/~/_/link.aspx?id=6D5134E956DA415B977A17D6D01FC658&z=z).

As stated by Keith, '[a] constant theme in the development of the role of the Ombudsman has been the acquisition of new roles, either in a personal or official capacity, a measure of the success of the Office and the status acquired by a number of its holders.'<sup>5</sup> The particular problems the fact the Thai Ombudsman will be identified in Chapters 7 and 8. This chapter will place that study in its international context by identifying the factors which affect the effectiveness of ombudsman schemes, such as in Thailand, in adopting a multifunction office to make informed decision in giving the ombudsman additional functions.

#### **4.1 Justifications for the expansion of the ombudsman's roles**

Since the 1970s, it has been reported that governments around the world, at both national and sub-national levels, have established ombudsman schemes with additional responsibility beyond administrative justice. Further, out of approximately 110 ombudsmen in operation studied by Keith in 2005, sixty percent are ombudsmen schemes which have assumed multiple mandates or been given roles that were not typically included in the traditional portfolios of monitoring legality and fairness in public administration.<sup>6</sup> Since 2005 the expansion of multiple mandates of ombudsman schemes around the world has continued.<sup>7</sup>

As argued in Chapter 2, the best constitutional explanation and justification for the ombudsman institution is that it helps to service a necessary need for a gap filler(s) in the constitution to make up for the shortcomings of the traditional tripartite separation of powers model. In particular, the Public Sector Ombudsman's role and the work of the office is crucial in filling a particular gap that is not addressed by other mechanisms in the justice system that provide for redress from perceived administrative grievances. For this reason the ombudsman has become and remains an office of administrative review, as it has been adopted in many countries. The historical background to the introduction of ombudsman schemes around the world supports such an analysis.

This section contends that the expansion of the roles of the ombudsman beyond the traditional core can be justified and explained within the analytical

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<sup>5</sup> K J Keith, 'Development of the role of the Ombudsman with reference to the Pacific', 22<sup>nd</sup> Australasian and Pacific Ombudsman Regional (APOR), Conference Parliament House, Wellington, New Zealand, 9 -11 February 2005.

<sup>6</sup> *ibid.*

<sup>7</sup> For example, IOI website and AOA website.

framework developed in Chapter 2. Applying the logic above, ombudsman schemes have been used for a range of subject matters beyond the traditional model. Recent trends in ombudsmanship have focused on protecting human rights, fighting corruption,<sup>8</sup> ensuring ethical conduct by elected public officials, and protecting the environment.<sup>9</sup>

In Asia, Africa, the Pacific and the Caribbean region, large misappropriations of public funds are perceived as an endemic problem, notwithstanding the prior existence of laws to address the problem. There are several types of oversight bodies that could be established to combat corruption, such as the courts or anti-corruption commissions. However in some countries, rather than create bespoke institutions for the purpose of fighting corruption, the choice has been made to give the ombudsman an express anti-corruption mandate as an additional function. Ombudsmen in the Republic of Korea, Macao, China, the Philippines, Viet Nam; and Yemen<sup>10</sup> have been entrusted with specific anti-corruption functions. Similarly, the ombudsman in South Africa has been given a mandate to enforce a leadership code of conduct which covers elected and senior public officials regarding matters such as misuse of government funds, conflict of interest and nepotism.

In regions emerging from military dictatorships, where the state and public officials had been, and sometimes continue to be, the major source of human rights abuses, a different dynamic exists. While the judicial mechanism is still entrenched as the main mechanism to protect human rights, there is an additional problem that often, at least initially; the judiciary are not trusted by the people as defenders of their rights as they are perceived to have been too closely associated with the authoritarianism of the previous regime.<sup>11</sup> In such instances, in several countries, the institutional setup of the ombudsman has evolved and been designed primarily around addressing this core need to safeguard human rights.<sup>12</sup> Human rights protection is given priority, though ombudsmen have not relinquished their general

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<sup>8</sup> Alice Tai, 'Diversity of Ombudsmen in Asia', Conference Papers, Stockholm, 2009, retrieved 23 May 2013, [http://www.theioi.org/downloads/74sji/Stockholm%20Conference%20Back%20to%20the%20Roots\\_Alice%20Tai.pdf](http://www.theioi.org/downloads/74sji/Stockholm%20Conference%20Back%20to%20the%20Roots_Alice%20Tai.pdf).

<sup>9</sup> Linda C Reif, *The Ombudsman, Good Governance and the International Human Rights System*, Martinus Nijhoff Publishers, Leiden/Boston, 2004.

<sup>10</sup> AOA member Fact Sheets, retrieved 24 May 2013, at <http://asianombudsman.com>.

<sup>11</sup> B Y T Tai, 'Models of Ombudsman and Human Rights Protection,' *International Journal of Politics and Good Governance*, Volume 1, No. 1.3, Quarter III, 2010.

<sup>12</sup> Thomas Pegram, 'Diffusion Across Political Systems: The Global Spread of National Human Rights Institutions', *Human Rights Quarterly*, Volume 32, No. 3, August 2010.

checking role on administrative power. After the end of dictatorship, the Portuguese and Spanish constitutions established, along with the constitutional court, the *Provedor de Justica* and the *Defensor del Pueblo* to supervise the protection of human rights in the new constitution and government administration. Ombudsmen in Azerbaijan, the Kyrgyz Republic, Tatarstan, and Uzbekistan focus solely on human rights protection. Many Latin America countries, after the military regimes collapsed in 1980s, established human rights ombudsmen with wide jurisdiction to improve human rights protection, a problem that still persists.<sup>13</sup> In Sri Lanka, the Office of the Parliamentary Commissioner for Administration, in addition to other functions, has the mandate to receive complaints filed by a person whose fundamental rights have been violated by a public officer or public corporation.

Thus it can be seen that in many places the role of the ombudsman has expanded from its traditional function, expressed exclusively in terms of administrative justice, to a broader role that explicitly addresses the issues of human rights and anti-corruption. Even older ombudsman offices are being given secondary functions of differing scope with respect to freedom of information, protecting privacy, child protection, and health system oversight.<sup>14</sup> The establishment of these additional roles was a response to the reality of the contexts within which ombudsman schemes were introduced or were already operating. There are numerous other instances relating to other ‘gap-filling’ functions of the constitution where the same choice has been made, i.e. to expand the ombudsman’s remit rather than create a fresh bespoke institution. For instance, Namibia and Lesotho<sup>15</sup> have granted their ombudsman offices with a specific mandate on environmental protection.

A linked argument in favour of the expanded ombudsman mandate is the perceived need for ombudsman schemes to respond to the changing environment in which it operates. The New South Wales experience provides a good example of how an ombudsman’s functions and powers have gradually evolved and developed

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<sup>13</sup> Amnesty International, *Report 2002*, Amnesty International Publication, New York, 2002.

<sup>14</sup> Ron McLeod, ‘Twenty Five Years of the Commonwealth Ombudsman’ in Dennis Pearce and Max Spry (eds.), *AIAL FORUM*, Number 36, Australian Institute of Administrative Law Inc., March 2003, p. 16; Katrine Del Villar, ‘Who Guards the Guardians? Recent Developments Concerning the Jurisdiction and Accountability of Ombudsman’, in Dennis Pearce and Max Spry (eds.), *AIAL FORUM*, Number 36, Australian Institute of Administrative Law Inc., March 2003, pp. 25-32.

<sup>15</sup> Linda C Reif, ‘Transplantation and Adaptation: The Evolution of the Human Rights Ombudsman’, *Boston College Third World Law Journal*, Volume 3, Issue 2, retrieved 27 June 2013, <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1442&context=twlj>.

over the last thirty years in a number of ways. In its early days, the key functions of the office were narrowly focused on resolving grievances about public authorities and administration. But over several years from the 1990s onwards, the office moved from a narrow examination of 'administrative' action to testing a much wider range of public service conduct, including: 'Any action of police, whether on or off duty; the handling of allegations of child abuse; and the operation of particular legislation'.<sup>16</sup> The increased public awareness of the problems existing in these areas has led to a number of changes in public policy so as to keep public authorities accountable. Correspondingly this raised profile has led to discussions on the 'underpinning concept of the role of public ombudsmen which is primarily to keep public authorities accountable by dealing with or investigating complaints on administrative action.'<sup>17</sup> In New South Wales, the increase in powers and the additional jurisdictions and functions that the office has subsequently gained is therefore designed to ensure that the ombudsman is capable of successfully rising to current public sector challenges and that its work remains relevant and important in society.<sup>18</sup>

On occasion, trust in the institution in terms of both its permanency in the legal and political landscape and its ability to deliver results has been a direct contributor to an institution which has increased in scale and scope, particularly where the mechanisms have proved to be efficient and effective. One might even argue that there is a tendency in the ombudsman community to consider ways of maximising the service. The older ombudsman offices that were originally created with a focus on the traditional mandate of redress and control have arguably been successful in expanding their remit to take on board a whole range of new functions. In New Zealand, the experience of the Ombudsman over nearly twenty years in dealing with information matters was the main reason for considering that the Ombudsman should have the monitoring role under the Official Information Act, while in other jurisdictions the regular courts, special tribunals or information commissioners were given those tasks.<sup>19</sup> In the Australian State of New South Wales, it is suggested that the ombudsman has been appointed the Commissioner

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<sup>16</sup> Bruce Barbour, 'The Ombudsman and the Rule of Law', Paper presented at the Annual Public Law Weekend, 5-6 November, 2004, IOI Occasional Paper.

<sup>17</sup> *ibid.*

<sup>18</sup> *ibid.*

<sup>19</sup> See for example, D J Shelton, 'The Ombudsmen and Information' 12 *VUWLR*, 1982, 233.

responsible for the Independent Commission against Corruption due to the unique position of the institution. Australian ombudsmen are now entrenched as independent of government, possessing a high level of public trust and profile, equipped with investigative capacities and fair dispute resolution offices.<sup>20</sup> The advantage of using the office of the ombudsman here is that as a high profile national institution, it is potentially better able to resist improper pressure from the executive than other bodies and is thus better equipped to undertake meaningful investigations.<sup>21</sup>

In states that cannot afford to fund several oversight institutions, an integrated oversight body with maladministration, anti-corruption as well as human rights violation mandates is a preferable solution as this can save cost. Though the ombudsman usually does not have the intrusive powers required for tackling the root causes of corruption, such as the power to conduct covert surveillance, intercept telephone calls, and arrest suspects for questioning, which may appear to relegate the ombudsman to a less significant role in contributing to the fight against corruption, the features associated with the ombudsman institution have several advantages. The absence of executive authority makes it relatively easy to accord the ombudsman real independence which is a preferred condition for effective corruption fighting as independence is a sign of the absence of political intrusion into the agency's operations. Additionally, given that it possesses a broad mandate and strong investigatory power, the ombudsman process can facilitate a simple and quick access to official and confidential documentation held by the state and individuals. This power assists the ombudsman in gathering credible evidence, plus the power to refuse to disclose it to any other person gives the office the added advantage of providing a shield against possible intimidation of informants and complainants. These advantages, in turn, permit the ombudsman a significant freedom of movement and of action. Besides, the ombudsman has the perceived advantage of being considered to be less complicated to establish when compared with other specialised anti-corruption agencies. And for these reasons many countries have adopted the ombudsman scheme as a part of their strategies for fighting corruption.

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<sup>20</sup> Anita Stuhmcke, 'Ombudsmen and Integrity Review', in L Pearson, Carol Harlow and M Taggart (eds.) *Administrative Law in a Changing State: Essays in Honour of Mark Aronson*, Hart Publishing, Oxford, 2008, p. 366.

<sup>21</sup> John Hatchard, 'Developing Governmental Accountability: The Role of the Ombudsman,' *Third World Legal Studies*: Vol. 11, Article 9, retrieved 27 June 2013, <http://scholar.valpo.edu/twls/vol11/iss1/9>.

Apart from the fact that it is convenient for the government to give the ombudsman tasks that do not easily fit into other state agencies, there is a notion that the integration of non-traditional functions into a single ombudsman office has the advantage of reducing the potential for institutional overlap and duplication<sup>22</sup> and allows for the concentration of expertise.<sup>23</sup> This solution arguably enables the ombudsman to achieve significantly higher quality work across all functions and eventually benefits the community it serves.<sup>24</sup> Constitutionally multi-purpose independent monitoring bodies, such as the ombudsman or a national human rights institution, might also be understood to carry greater public recognition and authority and hence be less vulnerable to executive attempts to weaken the institution or undermine its work.<sup>25</sup> By focusing the attention and responsibility for a range of oversight functions on one single body there is the potential to raise the public profile of the office and strengthen its position in countering such pressure.<sup>26</sup> In addition, recent developments in Australia illustrate that there are advantages, as ombudsman offices can be given extra funding by government if they can demonstrate their ability and effectiveness in discharging new functions. Due to budget constraints, Australian government agencies face reduction of their core funding. However, this can be countered by acquiring a new function that attracts additional funding. According to McMillan, '[t]he adoption of new functions has been the key to the doubling in size of my own office in recent years'<sup>27</sup>.

This section showed that one explanatory reason for an expansion to the jurisdiction of the ombudsman has to do with the 'gap-filling' functions of the constitution the ombudsman is employed to undertake in various countries. As for the reason for a country to have chosen to assign an ombudsman with an additional function rather than create bespoke institutions for the purpose of dealing with that function, these vary in practice. These reasons include the efficiency of using an

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<sup>22</sup> Victor O Ayeni, 'The Ombudsman in the Achievement of Administrative Justice and Human Rights in the New Millennium', *The International Ombudsman Yearbook*, Vol. 5, Kluwer Law International, Leiden, 2001, pp 32, 48; and John Hatchard, M Ndulo and P Slinn, *Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and South African Perspective*, Cambridge University Press, 2004, p 225.

<sup>23</sup> Hatchard et al., n. 21.

<sup>24</sup> Chris Field, 'Recent evolutions in Australian Ombudsmen,' presentation to the Australian Institute of Administrative Law National Forum, 2009, retrieved 24 July 2013, [http://www.ombudsman.wa.gov.au/Publications/Documents/speeches/060809\\_AIAL\\_Forum\\_2009.pdf](http://www.ombudsman.wa.gov.au/Publications/Documents/speeches/060809_AIAL_Forum_2009.pdf).

<sup>25</sup> *ibid.*

<sup>26</sup> Hatchard et al., n. 21.

<sup>27</sup> McMillan, n. 2.



existing office in relatively small jurisdictions; the opportunity of using an existing office with high esteem; and the similarity of the skill sets which makes the ombudsman appropriate. The next section deals with the new powers of the ombudsman - another issue associated with the expansion of the roles of the ombudsman.

## **4.2 Accompanying new roles with new powers**

To reinforce its expanding roles, some ombudsmen offices have been granted a range of complementary *powers* beyond the traditional model. Thus in addition to the usual investigative powers of the ombudsman, the office has been given such powers as the power to initiate prosecutions and enforce its findings. To reflect the adoption of additional powers that diverge from the classical Ombudsman model, these offices have often been referred to as ‘hybrid ombudsmen’, an evolution of institutions that combines both the role of an ombudsman in the classical sense and the role of ombudsmen with functions and powers beyond the traditional model.<sup>28</sup> Approximately 60 percent of all ombudsmen are hybrid in nature.<sup>29</sup> Some features of hybrid ombudsman schemes are similar to the existing ombudsman framework, such as independent funding and operation, particularly as regards investigating complaints, reporting findings and making remedial recommendations. However, there are also a number of areas of significant departure, as explained below.

Unlike the traditional ombudsman, various human-rights ombudsman institutions have been assigned with numerous human rights protection and promotion functions including the task of ensuring that national legislation as a whole complies with human rights and international law obligations or engage in human rights research and education<sup>30</sup> (e.g. Austria, Czech Republic, Albania,

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<sup>28</sup> The term ‘hybrid’ is generally used to refer to the ombudsman institutions that have significantly modified the traditional focus on mal-administration with an extensive mandate in human rights and anti-corruption, see Victor O Ayeni, ‘Ombudsmen as Human Rights Institutions: The New Face of a Global Expansion’, Speech at the 9<sup>th</sup> IOI World Conference, Stockholm, 2009, retrieved 27 July 2014, <http://www.theioi.org/publications/stockholm-2009-conference-papers>; Reif, n. 9, p. 7; Sabine Carl, ‘Toward a definition and taxonomy of public sector ombudsmen’. *Canadian Public Administration*, 55, 2012, 203–220.

<sup>29</sup> Arlene S Brock, *Repositioning the Ombudsman: Challenges and Prospects for African Ombudsman Institutions*, retrieved 27 July 2014, [http://aoma.ukzn.ac.za/Libraries/External\\_reports/Kenya\\_Draft\\_Report\\_of\\_the\\_Regional\\_Colloquium\\_of\\_African\\_Ombudsmen.sflb.ashx](http://aoma.ukzn.ac.za/Libraries/External_reports/Kenya_Draft_Report_of_the_Regional_Colloquium_of_African_Ombudsmen.sflb.ashx).

<sup>30</sup> Reif, n. 9, pp. 83–85.

Armenia, Estonia, Poland, Portugal, and Spain).<sup>31</sup> They are also often given diverse powers beyond those typically given to classical ombudsmen – they may include the right to appeal to ordinary or administrative courts, the right to start disciplinary prosecutions of civil servants or even to institute criminal prosecution (e.g. Greece, Finland, Bosnia, Poland, Lithuania), the right to contest laws and regulations before the constitutional court to test the constitutionality of the law.<sup>32</sup> It is considered that granting the human rights ombudsman with litigation powers can complement judicial protection.<sup>33</sup>

Anti-corruption ombudsmen have also been regularly endowed with powers beyond the traditional norm for classical ombudsmen. Some anti-corruption ombudsmen are granted coercive power, including prosecutorial and adjudicative powers, in addition to existing traditional ombudsman investigatory powers. The power to prosecute has mainly been used in developing countries where corruption levels are relatively high.<sup>34</sup> In the fight against corruption, the Uganda Inspectorate of Government can prosecute wrong doers.<sup>35</sup> In the People's Republic of China, the Ministry of Supervision functions directly under the leadership of the premier and is empowered by law to inspect, investigate, recommend, and, most significantly, directly impose administrative penalties.<sup>36</sup> The Philippines Ombudsman too has not just investigative powers but also preventive and punitive authority.<sup>37</sup> The ombudsman can prosecute persons in court<sup>38</sup> and suspend them from their jobs

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<sup>31</sup> Gabriele Kucsko-Stadlmayer (ed.), *European Ombudsman Institutions*, Springer Wien, New York, 2008, p. 63.

<sup>32</sup> Reif, n. 9.

<sup>33</sup> J E Mendez and I Aguilar, 'La relacion entre Ombudsman y el Derecho Internacional de los Derechos Humanos' 1 Debate Defensorial: Revista de la Defensoria del Pueblo, 55, 1998, cited in Reif, n. 9, p. 174.

<sup>34</sup> George V Carmona, 'Strengthening the Asian Ombudsman Association and the Ombudsman Institutions of Asia', Asian Development Bank, *Strengthening the Ombudsman Institutions in Asia*, Asian Development Bank Economics Research Paper Series, Asian Development Bank, Mandaluyong City, 2011, p. 15.

<sup>35</sup> B Waiswa (Secretary to the Inspectorate of Government, Uganda), *Country Report On The Fight Against Corruption: Inspectorate of Government*, A Paper presented at the 3<sup>rd</sup> Annual General Meeting of EAAACA in Bujumbura, Burundi, October 2009, retrieved 28 August 2013, [http://eaaaca.org/wp-content/uploads/2007/06/EAAACA\\_IG-Country-Report-on-the-fight-against-corruption\\_3rd-AGM\\_Bujumbura.pdf](http://eaaaca.org/wp-content/uploads/2007/06/EAAACA_IG-Country-Report-on-the-fight-against-corruption_3rd-AGM_Bujumbura.pdf).

<sup>36</sup> Administrative Supervision Law of the People's Republic of China – 1997, Chapter I. General Provision, retrieved 28 August 2013, <http://www.lehmanlaw.com/resource-centre/laws-and-regulations/administration/administrative-supervision-law-of-the-peoples-republic-of-china-1997.html>.

<sup>37</sup> An Act providing for the Functional and Structural Organization of the Office Of the Ombudsman, and for Other Purposes (Republic Act 6770), Section 15 (9) and 17.

<sup>38</sup> According to 1987 Constitution of the Philippines (Article XI), Accountability of Public Officers, Section 7, the existing Ombudsman Office shall be known as the Office of the Special Prosecutor.

pending and during investigation. In the Philippines, the ombudsman can order examinations of the bank accounts of persons under investigation. The State Inspector General of Viet Nam has extraordinary power to freeze bank accounts.<sup>39</sup> In Sri Lanka, the Office of the Parliamentary Commissioner for Administration can award compensation to complainants who have suffered due to delays or unfair decisions.<sup>40</sup> Likewise, the Republic of Korea's Anti-Corruption & Civil Rights Commission can impose fines for negligent acts.<sup>41</sup> The ombudsmen of the federal and provincial governments of Pakistan have the power to award compensation to any federal agency if civil complaints made against them have no good grounds or are raised purposefully to harass federal officials.<sup>42</sup>

This section showed that recent changes have widened the ombudsman's powers. They differ somewhat from the traditional model. Today ombudsman schemes have evolved significantly from their original versions in terms of their potential and claim to impact the manner in which government operate. Ombudsmen schemes share a core objective of protecting citizens from abuse of power by public officials. While it is still difficult to assess the effectiveness of the ombudsman, the next section will attempt to provide an explanation as to the potential successes in the expansion of role of the ombudsman.

### **4.3 Evaluating the expansion of the ombudsman's role**

In practice, therefore, around the world many ombudsman schemes have been required to operate a wider mandate than the traditional model, and granted significant extra powers to accompany that wider remit. Many academics have argued that the evolution in the ombudsman enterprise beyond the classical ombudsman model has been largely a positive development, as ombudsmen and policy-makers have pragmatically adjusted the roles of the ombudsman to meet the needs of the political, social and economic contexts within which they are situated. The growth of ombudsman functions in scale and scope reflects acceptance and trust

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<sup>39</sup> Government Decree No. 55, on Functions, Duties, Powers and Organizational Structure of Government Inspectorate.

<sup>40</sup> Article 156, Chapter XIX of the Constitution, 1978.

<sup>41</sup> Act on Anti-Corruption and Establishment and Operation of the Anti-Corruption & Civil Rights Commission, 1996; reorganised in 2008.

<sup>42</sup> Punjab Ordinance No. IX of 1996.

of the institution in providing efficient and free access to justice, as well as its permanency in the legal and political landscape and its ability to deliver results.<sup>43</sup>

Proponents of the way that the evolution of ombudsman schemes has occurred argue that in practice the development of the ombudsman's role in both old and new offices is not really a radical departure from its traditional function at all. By contrast, although the ombudsman institution may have evolved and diversified its functions, this has largely been achieved without compromising its core principles or aims. Indeed, it might be argued that what is happening is a more complete and logical reflection of what is necessary to fulfill those core aims.

For instance, it has been argued regularly that the pursuit of the human rights jurisdiction is very much interlinked with the core role of the Ombudsman.<sup>44</sup> The ombudsman in exercising its powers and interpreting whether a particular act of public officials is an act of maladministration may not explicitly or consciously refer to the generally accepted international standards of human rights, but it is nevertheless an act of upholding human rights.<sup>45</sup> Several ombudsman scholars have already observed that, although many ombudsmen have adopted human rights concerns as an explicit part of their mandate, the salient features and modus operandi of most human rights ombudsmen have not changed or deviated from the traditional model in any significant way.<sup>46</sup>

A similar analysis can be provided with regard to anti-corruption ombudsman. An ombudsman's traditional area is concerned with eliminating maladministration. Corruption issues may be intertwined with maladministration as most corruption of government has its origin in maladministration which leads to corruption and then embeds further maladministration, forming a vicious cycle. Therefore, though traditionally the ombudsman does not have an explicit mandate with regard to the fight against corruption, in broad terms corruption falls within the scope of maladministration. In this respect, the ombudsman can encounter corruption

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<sup>43</sup> Chris Field, 'Independence – A key principle', Presentation to the Australian and New Zealand Ombudsman Association Biennial Conference, 2010, retrieved 27 August 2013, [http://www.ombudsman.wa.gov.au/Publications/Documents/speeches/060510\\_Presentation\\_by\\_Chris\\_Field\\_to\\_ANZOA-2010.pdf](http://www.ombudsman.wa.gov.au/Publications/Documents/speeches/060510_Presentation_by_Chris_Field_to_ANZOA-2010.pdf).

<sup>44</sup> Anita Stuhmcke, 'Australian Ombudsmen and Human Rights', SSRN, 2009, retrieved 27 August 2013, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2310420](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2310420).

<sup>45</sup> Robertson, n. 1. p. 112; Reif, n. 15; Ayeni, n. 28.

<sup>46</sup> Roy Gregory & Philip Giddings, *Righting wrongs: The Ombudsman in Six Continents*, IOS Press, Amsterdam, 2000, p. 9.

indirectly in the investigation of complaints about inappropriate or unlawful treatment.<sup>47</sup>

In support of the above, experience in Australia provides a good example, in terms of development and diversities of roles. The reasons are first, the offices have been in operation for almost forty years, and secondly, through the Australian ombudsmen's shared history there is a diversity of functions and operation as every Australian state has calibrated ombudsmen to its own political environment. Both Stuhmcke and Snell concur that, despite the plethora of roles, the changes to jurisdiction and an increased focus on the quality of public administration, within the ombudsman design in Australia the individual complainant has been retained as the Australian ombudsman's primary focus. Further, throughout its almost four decades of operation, the ombudsman institution has remained faithful to its core features, while proving to be both flexible and responsive to external changes.<sup>48</sup>

This section has examined arguments in favor of the expansion of the roles of the ombudsman. It shows that there is a strong claim that the expansion of the roles of the ombudsman is largely a very positive one. However the expansion of the office of the ombudsman is not without problems and it cannot be assumed that it is always appropriate to expand the roles of the ombudsman. Many challenges remain, and it cannot be assumed that there are no limits to the boundaries of what an ombudsman can and should be asked to do. This will be discussed in the next section.

#### **4.4 Risks in the multi-function model**

The previous section has demonstrated that the ombudsman's flexibility, together with its capacity, enables it simultaneously to assume many roles. However, in some instances, the acquisition of these additional roles may not be appropriate. As Pearce has noted, ombudsmen have not had the same level of success in the performance of these functions as in their traditional complaint handling.<sup>49</sup> Therefore the concerns that have been expressed about the ombudsman's expanding role cannot

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<sup>47</sup> Ivan Bitzjak, 'Special Features of the Role of the Ombudsman in Transition Condition,' in Linda C Reif (ed.) *The International Ombudsman Yearbook*, Vol. 5, *The International Ombudsman Yearbook*, Kluwer Law International, 2001.

<sup>48</sup> Anita Stuhmcke, 'The Evolution of Classical Ombudsman: a view from the antipodes', *Int. J. of Public Law and Policy*, Vol.2, No.1, 2012.

<sup>49</sup> Dennis Pearce, 'The Commonwealth Ombudsman: The Right Office in the Wrong Place', in Robin Creyke and John McMillan (eds.), *The Kerr Vision of Australian Administrative Law at the Twenty-Five Year Mark*, 54, Centre for International and Public Law, 1998, at 62.

be ignored. Ombudsmen and scholars have noted the benefit of the expansion but also put forward the risks associated with being asked to perform new roles.

From these critics, it would not be possible to specify a list of what an ombudsman ought to do or not to do, as many of the potential problems will directly relate to the context of the country and the specific scheme in question. However the critics have presented both theoretical and practical challenges and there are a few obvious guidelines that can be adopted by way of general observation. For the purpose of this section, four general areas of difficulty will be explored. These issues are chosen for further study because they are most frequently discussed and also specifically relate to the situation of the Thai Ombudsman. First, the section looks at the potential that some roles are simply incompatible with the wider role of the ombudsman. Second, the section suggest that there are some roles which may look compatible with the general ombudsman model but are dangerous because they have potential to drag the ombudsman into politically controversial areas, which will have a detrimental impact on the ombudsman's reputation. Here much depends on the status of the office and the context within which it operates. Third, the section identifies a number of the general practical issues which may affect the ombudsman's effectiveness in terms of its new functions, and may lead to problems of institutional overload. Finally, the section looks at some dangers in the ombudsman design which are inherent to all unelected institutions.

#### ***(a) Incompatibility of roles***

Underpinned by the theoretical perspective that an ombudsman is best modelled for supporting the delivery of administrative justice, many scholars and ombudsman have opined that designers of ombudsman schemes must first be sure that any new functions assigned to the office will not require the ombudsman to do something that is essentially different in purpose from its core functions. In particular, any addition of functions should not compromise its core function and thereby threaten the institution's very essence.<sup>50</sup> In this context, two issues warrant further consideration as they are frequently identified as involving roles that could be incompatible with the ombudsman is traditional core functions. They are the issues of advocacy and enforcement.

### ***Advocacy and the ombudsman***

In dealing with individual complaints, though from time to time a complaint can reveal defective administration, illegality or misconduct which attracts a grand scale of publicity to the detriment of the government of the day, it is generally held that it is important that the ombudsman does not act as an advocate or agent of the complainant or the concerned agency. At most, the ombudsman is an advocate for good administration. However in carrying out activities associated with some of the specialist functions that have been assigned to Ombudsman offices, there is a danger that the ombudsman is required to assume the role as an advocate/defender/guardian. As has happened, it is not easy for the traditional ombudsman to undertake such a role because the ombudsman must be fearless in defending the rights and interests of the citizen, while trying to preserve its ability to work closely with the executive in addressing complaints and righting administrative wrongs.<sup>51</sup> The reason is that advocacy would endanger the ombudsman's credibility as an independent and objective critic.<sup>52</sup>

The Australian experience may be taken as an example of some of the risks. The Commonwealth of Australia Ombudsman was given a role under Freedom of Information Act. The task required the ombudsman to represent, as a counsel before an appeal tribunal, citizens who had been refused access to official documents under this legislation. According to Pearce, by appearing before the appeal tribunal on behalf of a disappointed citizen, the Commonwealth of Australia Ombudsman was obliged to abandon the traditional impartial position jealously guarded by the office. This impinged unsatisfactorily on established relationships with agencies of government and changed the perception of the ombudsman.<sup>53</sup>

Similarly in New Zealand, the Ombudsman was assigned a membership of the Human Rights Commission due to his background. However it was considered that the work of the Commission departed significantly from the ombudsman concept. The Commission was concerned with private sector discrimination as well as discrimination in public sector administration. The methodology of the

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<sup>51</sup> Stephen Owen, 'The Expanding Role of the Ombudsman in the Administrative State', *University of Toronto Law Journal*, 40, 1990.

<sup>52</sup> Standing Committee 1994: 39, cited in David Pond, *The Impact of Parliamentary Officers on Canadian Parliamentary Democracy: A Study of The Commissioner of the Environment and Sustainable Development & The Environmental Commissioner of Ontario*, Canadian Study of Parliament Group, 2010, retrieved 27 August 2013, <http://www.studyofparliament.ca/English/pdf/PondPaperFinal-2010-e.pdf>.

<sup>53</sup> Owen, n. 51.

Commission also differed – in performing their functions, the Commissioners took a conciliation role. Further the Commission had a broad public policy advice role. Consequently, the Ombudsman withdrew from the Commission's work as it was felt that the Commission's work was incompatible with the function or office of the Ombudsman. Eventually the office was removed from the list of Commissioners when the Commission was reconstituted in 1993.<sup>54</sup>

### ***Enforcement powers and the ombudsman***

In Chapter 3 we have seen that the traditional ombudsman does not possess powers to control decision-making or interfere unduly with the administrative process but it does possess significant power to enhance transparency of, as well as influence and place public pressure upon, decision-making. This is a great positive advantage because without such enforcement powers the ombudsman can arguably enter into challenging areas of administrative practice more confident that it can avoid confrontation with officialdom.

The overall benefit of this 'softer' approach is that officials are more likely to accept recommendations than if they were viewed with more hostility. And if persuasive techniques are not sufficient to secure change, ombudsman schemes can still seek political pressure through those who exercise power within the state, parliament and executive. It was further argued in chapter 3 that the absence of the enforcement power is a key part of the attributes or features of the office which not only continues to distinguish the institution from other oversight bodies but has also enabled it to naturally adapt into the existing constitutional framework. The strength of such qualities has been widely recognized throughout the democratic world, with one result that ombudsmen have been called upon to perform an increasing range of functions. In the areas of human rights and anti-corruption, it has been suggested above that the ombudsman institution, though without enforcement powers to compel recommendations, can make a great contribution.

However, different trends can be identified in countries with weaker democratic traditions, or even states with a recent history of authoritarianism. Here, the ombudsmen have been more frequently armed with a stronger supporting compliance mechanism, either directly to or via the courts, especially where the

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<sup>54</sup> *ibid.*



ombudsman has an express jurisdiction in anti-corruption.<sup>55</sup> These powers are particularly found in several newly established ombudsman offices in America, Africa and Eastern Europe and Asia,<sup>56</sup> where the offices are charged with the additional function of the enforcement of a leadership code, anti-corruption or human rights protection.<sup>57</sup>

As noted above, there are advantages in establishing a unified office rather than a separate anti-corruption body, particularly as this assists in countering possible intimidation of informants and complainants, in addition to the benefit of cost efficiency. However there are arguments against the operation of the ombudsman in this field. It has been suggested that the combination of the ombudsman's traditional functions with anti-corruption would impede anti-corruption efforts because an ombudsman is not well-suited to fight corruption effectively as fighting corruption requires enforcement power of some form.<sup>58</sup> These two functions are quite different. While an Ombudsman's Office is meant to improve the operation of the public administration through the treatment of complaints about specific actions by a public body, an anti-corruption agency has a mandate to investigate and forward to prosecutors any information they may have about corruption.<sup>59</sup>

From the above arguments, an issue to consider in assigning new roles to an ombudsman office is that there are functions that are qualitatively different or which require a different level of enforcement powers. According to Reif, a function of human rights protection performed by the ombudsman and anti-corruption function should not be assigned for the same office but should be located in separate institution.<sup>60</sup> The argument is that each office should have appropriate powers to fulfil its mandate. This is because functions that are qualitatively different will require different structural establishment and different levels of enforcement.

Notwithstanding the above argument, there are some jurisdictions which have ombudsman offices with more powers beyond those of recommendation and

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<sup>55</sup> See E F Short, 'The Ombudsman in Ghana', and Jorge Luis Maiorano, 'The Defensor del Pueblo in Latin America', in Gregory and Giddings, n. 46.

<sup>56</sup> Asian Development Bank, n. 34, p. 2.

<sup>57</sup> For example Uganda, Papua New Guinea.

<sup>58</sup> Jon S T Quah, *Evaluating the Effectiveness of the Office of the Ombudsman in the Philippines*, The World Bank, 2004, retrieved 18 June 2013, [http://siteresources.worldbank.org/PUBLICSECTORANDGOVERNANCE/Images/285740-1351266456008/8909406-1394484377609/Quah\\_Evaluating\\_OMB\\_Effectiveness.pdf](http://siteresources.worldbank.org/PUBLICSECTORANDGOVERNANCE/Images/285740-1351266456008/8909406-1394484377609/Quah_Evaluating_OMB_Effectiveness.pdf).

<sup>59</sup> Ayeni, n. 28.

<sup>60</sup> Reif, n. 28, at 395.

reporting. For example the ombudsmen in Sweden and Finland can prosecute or commence disciplinary proceeding against public officials. But such enforcement power is considered exceptional and generally rarely used.<sup>61</sup> It should be noted that the involvement in lawsuits during 1995-1998 by the Ombudsman in Papua New Guinea was criticized as not ideal with respect to the ombudsman's key benefit of persuasion, consultation and compromise rather confrontational litigation.<sup>62</sup>

### ***(b) Politically controversial areas and the ombudsman***

The above section discussed some roles that the ombudsman should not undertake as they are considered incompatible with the ombudsman concept in general. This section turns to some roles that the ombudsman can perform, but in carrying out such a role, there is a risk that the perceived impartiality of the ombudsman might be negatively affected. The extent of the risk depends much on the status of the office and the context, especially the political context within which a particular ombudsman is operating.

As argued in chapter 3, without coercive power, fostering a high level of perceived impartiality in order to generate trust in the office is essential for the acceptance of and compliance with the ombudsman's recommendations. To achieve this status the ombudsman is supposed to be 'free from political consideration... to speak freely and assess independently'.<sup>63</sup> Overall the goal is for an ombudsman to be considered a non-political institution. As observed by Caiden and Valdes, however, the ombudsman could actively become involved more directly in political matters if he chose to interpret his jurisdiction liberally and assumed a trouble-shooting role which led to the office filling a perceived vacuum in decision-making (competing with the executive) or criticizing the overall performance of government (behaving like the opposition).<sup>64</sup>

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<sup>61</sup> Stig Jägerskiöld, 'The Swedish Ombudsman', *University of Pennsylvania Law Review*, Vol. 109, No. 8, June, 1961, at 1087.

<sup>62</sup> Victor O Ayeni, 'The Role and Effectiveness of the Ombudsman Institution', National Democratic Institute, 2005.

<sup>63</sup> R D Bakewell, 'The Ombudsman and Politics', *Australian Journal of Public Administration*, Vol. XLV no. 1, 1986; Dennis Pearce 'The Commonwealth Ombudsman: Present Operation and Future Development', Papers on Parliament No. 7 - Unchaining the Watch-Dogs, March 1990, 47-59, retrieved 28 October 2013, [http://www.aph.gov.au/About\\_Parliament/Senate/Research\\_and\\_Education/~/\\_/link.aspx?id=6D5134E956DA415B977A17D6D01FC658&z=z](http://www.aph.gov.au/About_Parliament/Senate/Research_and_Education/~/_/link.aspx?id=6D5134E956DA415B977A17D6D01FC658&z=z).

<sup>64</sup> Gerald E Caiden and Daisy A Valdes, 'Maturation issues for the ombudsman', in Linda C Reif (ed.), *The International Ombudsman Anthology: Selected Writings from the International Ombudsman Institute*, Kluwer Law International, the Hague, 1999, pp 102-105.

With relation to the ombudsman the risk remains, however, that even with the best of intention, an ombudsman who actively becomes involved more directly or too actively in political matters which should be more properly undertaken by the political branches, exposes himself and his office to the risk of being seen as politically partisan in the eyes of some politicians. Such an act endangers the office's claim to impartiality. As a consequence the ombudsman could lose trust, followed by a reduction in the ability to influence. Given the ombudsman's lack of enforcement power and its reliance upon techniques of suasion, once its powers of influence are reduced the ombudsman begins to lose everything. Politicisation poses a threat to impartiality of the ombudsman.<sup>65</sup>

In practice ombudsman institutions around the world have in general exercised restraint in their involvement in political or social controversy, particularly in matters that are more appropriately dealt with by parliamentary intervention.<sup>66</sup> According to Professor Pearce, he always took a few precautions when raising policy issues, in order not to intrude too far into the political arena and preserve the non-political and non-controversial role.<sup>67</sup> For instance, his Office would not make suggestions that the law be altered where there had been recent consideration of a matter by the Parliament. A particular challenge for the office is where the issue under investigation involved general public attention, a circumstance where the ombudsman might not be able to decline involvement. In such a scenario a long drawn out investigation may not be appropriate, but likewise an ineffectual review could potentially diminish the credibility of the ombudsman in the public's eyes. In such cases, the ombudsman is challenged to conduct a sufficiently serious investigation to decide whether a genuine problem does exist and then make recommendations for further independent inquiry to examine the issue fully.<sup>68</sup> All the while, the purpose is to retain integrity in the investigation, while piloting an approach that steers the ombudsman away from direct confrontation with the Government over politically sensitive issues.

An example of this approach can be seen in the Commonwealth Ombudsman's involvement in an investigation of a policy of the Australian Defence

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<sup>65</sup> *ibid.*

<sup>66</sup> Pearce, n. 63.

<sup>67</sup> Dennis Pearce, 'The Ombudsman: Review and Preview: The Importance of Being Different', *The Ombudsman Journal*, No. 11, 1993, at 95-96.

<sup>68</sup> *ibid.*

Force which stipulated that, subject to very limited exceptions, homosexuals should be barred from the Defence Force and dismissed if necessary. In investigating a complaint, the Ombudsman raised the question of whether this policy was in accordance with present attitudes of society towards homosexuals and whether there was a justification for discriminating against such persons. Having raised the matter in his report, he indicated that he would not pursue the matter further as, if it were to be taken up, it was more appropriate that this be at the parliamentary/political level. This approach was suggested to have saved the Ombudsman from being seen to ignore the problems of society, while simultaneously, enabling the Ombudsman to steer away from political conflict.<sup>69</sup>

In dealing with individual complaints, though from time to time a complaint can reveal defective administration, illegality or misconduct which attracts a grand scale of publicity to the detriment of the government of the day, in the main the general wisdom is that ombudsman schemes should avoid regular confrontation. Instead, it seems that the ombudsman in general should work behind the scenes in a manner congenial to all parties. Such an argument for caution does not imply that there should not be tension between the ombudsman and the executive. Such strain is unavoidable if the ombudsman is to do its work meaningfully.

Thus when under pressure or even attack, especially when that attack comes in the form of criticism from an executive member, the ombudsman needs to be able to rely upon others to do its political fighting for it. This is because the ombudsman does not have its own political power base; and this is where strong links with the legislature, which is responsible for supporting and supervising the ombudsman institution, can provide a valuable bulwark. Again, however, such links become difficult to build and maintain, if the ombudsman is seen to be operating in an excessively controversial fashion or to have over-reached its remit. Moreover, the likelihood of the ombudsman office being vulnerable to political attack is increased. According to Robertson, bureaucracy is sensitive to the political executive's opinion, if it senses that the relationship between the government and the ombudsman has become adversarial or combative, the ombudsman's chances of receiving cooperation or approval findings are considerably diminished.<sup>70</sup>

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<sup>69</sup> *ibid.*

<sup>70</sup> Robertson, n. 1, p. 10.

The above occurrence is more likely to happen when ombudsmen schemes are given power to intervene in very sensitive areas and the ombudsman's act was perceived as posing too much of a threat to those whom the ombudsman most needs to support and whose support the ombudsman most needed. With this risk in mind, it has been observed by both ombudsman scholars, as well as experienced ombudsmen, that the potential for politicisation has been compounded by the assumption by ombudsman offices of additional roles and functions, such as human rights protection, freedom-of-information advocates, privacy guardians and equality defenders precisely because such issues bring the ombudsman closer to sensitive areas of public policy.<sup>71</sup>

A practical example in Russia and Latin America helps illustrate the point. In the Russian Federation the first Ombudsman bearing the title 'High Commissioner for Human Rights' was appointed in 1994, only to be dismissed by the Duma a year later for his criticism of the Russian intervention in the Chechen Republic. In Latin America, the severe human rights and accountability situation there prompted the introduction of several ombudsman schemes to tackle mass violations of fundamental human rights.<sup>72</sup> In performing this role, Ombudsmen have taken a proactive stance in their roles as an advocate of people and occasionally received a hostile response from governments. El Salvador provides one example of political interference. Following a period of conflicts with the government, an ombudsman was removed for ignoring his duties, but the government then refused to elect a new ombudsman. During the three years without a functional ombudsman, important personnel had moved on to other jobs and the institution had lost the credibility it had established earlier.<sup>73</sup>

The point discussed above has focused on how the expanded jurisdiction can potentially push the ombudsman toward political conflict and expose the institution to political pressure. However the case of Russia and El Salvador exemplify an argument that working in an unfavourable context where the ombudsman works can make the ombudsman's work more difficult. It is suggested that an ombudsman cannot work well in a state where there is weak respect for the rule of law and the

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<sup>71</sup> *ibid.*

<sup>72</sup> L G Volio, 'The Institution of the Ombudsman: The Latin American Experience', *Revista IIDH* (Instituto Interamericano de Derechos Humanos) 37, 2003; Fredrik Uggla, 'The Ombudsman in Latin America', *Journal of Latin American Studies*, Vol. 36(3) 2004, 428.

<sup>73</sup> Uggla, n. 72, 434.

democratic culture is not well established.<sup>74</sup> In the case of Russia above, the ombudsman might have been too bold and unwise to make the institution a target of attack by the government and the role might not be appropriate. But it can be argued that in a democracy with a longer heritage, the government would not be so sensitive to negative criticism over its policy or the ombudsman would not be abolished just because of negative criticism against the government policy.

### ***(c) Problems of institutional overload***

As Pearce has advised, the ombudsman should not be afraid to assume new functions but at the same time the office should not be too ambitious or create false expectations as to what it can do beyond its capacities.<sup>75</sup> Likewise Ayeni has commented that an expanded role presents potential problems, such as the capacity of the office to take on additional responsibilities effectively and the possibility that the office could become overloaded with the responsibilities of so many functions being undertaken simultaneously. One potential outcome is underperformance; another is that the check against maladministration, the ombudsman's core business, is lost.<sup>76</sup>

Such problems of institutional overload are interlinked, but for here the risks are broken down into the discrete issues of lack of resources, lack of expertise and reduced clarity of purpose of the ombudsman office.

### ***Lack of resource***

As noted above, numerous ombudsman offices have been charged with multiple functions for a variety of reasons. While there may be many advantages to multipurpose ombudsman offices, as discussed in the forgoing section, the creation of such an office should be scrutinized carefully. It can be argued that giving two or more functions to an ombudsman institution may not yield the positive results expected if its capacity is constrained by insufficient resources.<sup>77</sup> According to Reif

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<sup>74</sup> P Nikiforos Diamanduros, 'The Role of the Ombudsman in strengthening accountability and the rule of law', Speech at the Constitution Unit, University College London, 29 November 2005, retrieved 23 October 2013, <http://www.ombudsman.europa.eu/speeches/en/2005-11-29.htm>.

<sup>75</sup> Pearce, n. 67, at 97.

<sup>76</sup> Victor O Ayeni, 'The Ombudsman in the Achievement of Administrative Justice and Human Rights in the New Millennium', in Linda C Reif (ed.) *The International Ombudsman Yearbook*, Vol. 5, 2001, at 49.

<sup>77</sup> Thomas Pegram, 'Weak Institutions, Rights Claims and Pathways to Compliance: The Transformative Role of the Peruvian Human Rights Ombudsman', *Oxford Development Studies*, Vol. 39, No. 2, June 2011.

multifunctional ombudsman offices in some Latin America states have been found to suffer from insufficient financial resources.<sup>78</sup> Pegram noted that, given the breadth of the institution's mandate and its inadequate funding, there was a risk of over-extension of institutional resources and a likely detrimental effect on the ombudsman's impact.<sup>79</sup> Similar experiences have been noted for ombudsmen in Africa, also provided with various mandates but insufficient resource to accomplish their tasks properly.<sup>80</sup>

A particularly good example of unrealistic demands being made of an ombudsman comes from Papua New Guinea. Through legislative reform,<sup>81</sup> the Papua New Guinea Ombudsman office has been made responsible for keeping a check on 5,340 politicians which have become covered by the national Leadership Code, without a corresponding increase in resources to support the new role.<sup>82</sup> As a result, enforcing the Leadership Code has become a constraint on the ability of the Ombudsman to carry out its functions effectively. According to Amankwah and Omar:

It appears that in its dual function of ensuring administrative justice and enforcing the Leadership Code, to keep the political system free of vices, the latter task has taken more time and resources. It is not suggested that enforcing the Code is any less important than ensuring administrative justice. What is important to ponder over is the question whether the onerous responsibility of ensuring the integrity of political and other leaders is a task that the Ombudsman Commission can carry out realistically.<sup>83</sup>

From the experience in Latin America, the Pacific and Africa above, it can be seen that there are examples of ombudsman schemes being given powers which it is unable to exercise adequately by reason of resource constraints. This is because there is a possibility that the additional functions are conferred to the office without

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<sup>78</sup> Reif, n. 9, at 395.

<sup>79</sup> Pegram, n. 77.

<sup>80</sup> *ibid.*

<sup>81</sup> The 1995 reform to the *Organic Law on Provincial and Local Level Governments* cited in M-L O'Callaghan, 'Provincial shake-up brings payout for MPs and raises doubts', *The Australian*, 15 September 1995; and S Dorney, 'Ombudsman's job 'impossible' under proposed PNG reforms', *Radio Australia*, 18 June 1995, cited in Alice de Jonge, 'Ombudsmen and Leadership Codes in Papua New Guinea and Fiji: Keeping Government Accountable in a Rapidly Changing World', 1998, retrieved 24 October 2013, p. 14, <http://www.paclii.org/journals/MLJ/1998/6.rtf>.

<sup>82</sup> O'Callaghan, n. 81.

<sup>83</sup> H Amankwah and K Omar, 'Buttressing Constitutional Protection of Fundamental Rights in Developing Nations: The Ombudsman Commission of Papua New Guinea - A New Hybrid', 18 *Melanesian Law Journal*, 74, 1990, p. 98 cited in de Jonge, n. 81.

proper thought about the budgetary implications.<sup>84</sup> Given the various demands on government there might be sound economic reasons for failures in funding an ombudsman scheme, but nor can it be ignored that restricting the budget of an ombudsman is a potential opaque tactic by which their impact can be neutered. In this light, asking the ombudsman to take on a wider range of duties without sufficiently resourcing the change could be interpreted as a strategy to reduce the ombudsman's influence. The granting of new functions to an ombudsman scheme therefore does not necessarily imply a positive promotion of accountability.

### ***Lack of expertise***

To perform a new role requires sufficient resources, but it might also need fresh expertise to enhance a knowledge-based insufficiently present within an ombudsman scheme. Without relevant and appropriate expertise, an ombudsman scheme is unlikely to deliver on its new function to the standards expected of it.

An account from the Commonwealth of Australia scheme can provide a good example of a case where an ombudsman has not been prepared for its new tasks. According to Pearce, one of the new roles that his office took on was to audit the compliance of the police with the relevant legislation that outlined the conditions under which telephones might be tapped.<sup>85</sup> Such a role imposed different demands on the office than its ordinary complaint handling and investigation. By contrast to primarily focusing on addressing personal grievances, the purpose of statutory audit is to ensure that law enforcement powers that are otherwise hidden from public gaze are being exercised in strict compliance with detailed legislative requirements. This requires appropriate auditing staff who can engage full-time in their activities in order that every audit is carefully and professionally conducted, and properly reported. Remarkably, when first granted this new role, the specific task of auditing was not performed by the ombudsman office because, apart from insufficient resources such as funding and staff, it lacked the required skills to perform such a function.<sup>86</sup>

Out of this experience, Pearce noted a clear rationale for choosing the ombudsman to deliver the new role. The ombudsman is perceived by the public to be

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<sup>84</sup> Jack Richardson, 'The Ombudsman's Place among the Institutions of Government – Past, Present and Future' *Australian Journal of Administrative Law*, 183, 8(4), 2001, at 190.

<sup>85</sup> Under the Telecommunications (Interception) Act 1979 (Cth).

<sup>86</sup> Pearce, n. 67, at 77.



independent from government and free from political pressure. In this regard, if a government wished to appoint a review body that would be able to verify the ethical integrity of government, one which was largely untarnished by corruption of any sort, the ombudsman's office would appear a good choice given its sound credentials. Further, there may be a temptation in such circumstances for the ombudsman to want to enhance their profile and status by accepting the task. However, the benefits that may accrue from the expansion to the office and the previous good will located in the ombudsman may be undermined if the new function is not performed well. In this respect, the new tasks might require different skills that the ombudsman does not possess or has not yet developed, and unless managed well this may result in the ombudsman's failure to perform its legislative duties.

Subsequently in 2001, the Commonwealth Ombudsman was allocated the task of monitoring and reviewing compliance with controlled operations legislation (Part 1AB of the Crimes Act 1914 (Cth)) by the Australian Federal Police and the National Crime Authority (NCA). Once more it was found that the ombudsman office was often unable to investigate complaints against police adequately, particularly complaints involving allegations of significant criminality. Thus, initially in many cases it resorted to relying upon police internal investigation and there was no external, independent review of complaints by the ombudsman.<sup>87</sup>

Over the years the auditing task has gradually become a substantial function of many ombudsman offices and is now seen as an appropriate ombudsman role.<sup>88</sup> One question might arise as to how the ombudsman can carry on without expertise. In fact, in the initial stage criticisms were made about the role actually performed by the ombudsman in carrying out this function, but the enhanced expectation placed upon the office has forced it to develop new techniques required to fulfil the function.<sup>89</sup> The pertinent issue that the ombudsman should consider here is whether and for how long the stakeholders are prepared to bear with the earlier failures before it can acquire adequate expertise and perform well.

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<sup>87</sup> Villar, n. 14.

<sup>88</sup> John McMillan, his office has undertaken audits of freedom of information administration, child support assessment decisions, notification of visa decisions, complaint handling in agencies, and payment of administrative compensation under the scheme for Compensation for Defective Departmental Administration.

<sup>89</sup> Trevor Buck, Richard Kirkham, and Brian Thompson, *The Ombudsman Enterprise and Administrative Justice*, Ashgate, Farnham, 2011, p. 146.

Notwithstanding the subsequent successes in Australia in ombudsman schemes adopting new roles, Pearce's earlier experience as an ombudsman provides us with a lesson that legislation can create a degree of public expectation on what the ombudsman is supposed to do (despite the office not being well-equipped to perform the role). In turn, the relative failure of the office to perform its statutory duties in full reflected badly on the ombudsman. For Pearce, the fear was that the public might not accept that the ombudsman was not able to provide a good service because of a lack of resources or expertise, with the possible result that in the public view the credibility and standing of the ombudsman office would be significantly dented. The potential for such an equivalent scenario occurring is of particular importance for an ombudsman during its formative years, when it needs to earn respect from the public and other constitutional players in order to thrive.

### ***Clarity of purpose and image***

A strong note of caution about the expansion of the ombudsman's role has been expressed by Robertson. His core concern is that the ombudsman institution was designed specifically to achieve success in reducing or eliminating the excesses of bureaucracy. In this aspiration, there is a danger that new roles might have an adverse impact on the robustness of the essential features of the ombudsman which might compromise the institution's core role of protecting the individual complainant.<sup>90</sup> Undertaking too many functions by an ombudsman can lead to problems in the clarity of purpose of the image and the focus of the institution. Such an adverse impact might occur as a result of the traditional role getting lost in the myriad of other roles performed by the ombudsman or the ombudsman's overall image in the public eye becoming clouded by the diverse roles performed by the office. Along similar lines, McMillan has also observed that expansion can lead to "public confusion", public deception" and "ill-considered change".<sup>91</sup> To avoid mission drift, therefore, the discharge of any new function should be adapted to ensure that it is aligned with the ombudsman's essential principles in order to secure the long-term stability of the office.

Some of the roles that have been given to the ombudsmen, such as the audit of police powers described above, involve the investigation of matters that are

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<sup>90</sup> Robertson, n. 1.

<sup>91</sup> McMillan, n. 19 at 4; and McMillan, n. 2.

wholly unrelated to administration. A similar example is the investigation of the ethics of politicians, which are not always inspired by citizens but instead flow from the pursuit of 'political' complaints about the ethics of political opponents.

A danger in this expansion is that the institution becomes less a citizen focussed office and more an office wrapped up in issues which do not require the input of the citizen. This can be argued to represent a significant deviation from what the office of the ombudsman is supposed to be about and a shift of role from the traditional role of ombudsmen. There is even the risk that in a multifunction office, the traditional role will be overshadowed by other functions, especially where the additional roles have enforcement powers.<sup>92</sup> As a consequence, some of the distinctive role of an Ombudsman's office is lost, or at least confused, such as pursuing citizen based grievances and bringing outside values into the business of government.<sup>93</sup>

Further these changes in the role and function of the ombudsman can alter the nature of ombudsmen by putting the ombudsman in the position of becoming a tool of executive government, instead of accommodating the need of the citizen. This in turn raises the question as to its original purpose and whether the ombudsman can still retain its role as an institution that acts in the interest of citizens. An unclear image would result in public confusion and likely damage to the standing of the office may ensue.

#### ***(e) Dangers of unelected institutions***

While constitutional watchdogs are said to be introduced to provide for more a effective check and balance in the constitution, there has been criticism surrounding the work and role of such institutions. A prevailing critique lies in their lack of democratic legitimacy and their tendency to discourage political representatives from taking full responsibility for decision-making and administrative performance.<sup>94</sup> Such a result partly occurs by restricting the scope for policy-makers to adapt to current demands on government, but also through a tendency for decision-makers to defer too easily to the direction of watchdogs.

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<sup>92</sup> Salvador T Carlota, 'The Ombudsman: its effectivity and visibility amidst bureaucratic abuse and irregularity', *Phil. L. J.*, 12, 65, 1990.

<sup>93</sup> John McMillan, 'The Ombudsman's Role – Looking Backwards, Looking Forwards', the Australian Public Service Commission Leadership Lunchtime Seminar Sydney, 25 June 2003.

<sup>94</sup> Richard Kirkham, 'A Welsh Twist on the Constitutional Status of Watchdogs', *Cambrian Law Review*, (forthcoming 2015).

Several scholars have identified additional problems associated with watchdogs, such as the layers of bureaucracy they create and the added costs to governance incurred. Watchdogs also provide public agents with competing and incompatible expectations that need to be met, leading to multiple accountability disorders as an organisation trying to meet conflicting expectations could become dysfunctional.<sup>95</sup> Perhaps a more serious criticism is the potential for watchdogs to engage in empire building.<sup>96</sup> There is a tendency that watchdogs could reinterpret the jurisdictional boundaries of their position to suit their own vision of how their office should operate. This in turn might lead to public mistrust and eventually a question as to whether they should continue in operation.

All of these dangers pertain to the ombudsman as much as any other autonomous unelected institution and imply that robust arrangements need to be in place to call the ombudsman to account. As with the other risks outlined above, accountability processes must be in place to verify the continuing and appropriate effectiveness of the office. Such a conclusion applies to the ombudsman generally, but because of some of the difficulties that the ombudsman offices with multiple functions have faced in achieving their goals, is particularly important with regard to multi-function offices.

## 4.5 Conclusion

It seems that it is difficult to limit the role of the ombudsman by creating theoretical exceptions to its jurisdiction, as a core rationale of the office of the ombudsman is to attempt to fill in the accountability functions that are not adequately covered by other existing institutions. Thus, in many contexts the traditional role of the ombudsman office has been expanded to encompass a range of new roles, including human rights protection, anti-corruption provision, and freedom of information, constitutional review, and many others. But the experience of ombudsman schemes around the world has supported the argument that there are risks associated with these new roles. Therefore this chapter contends that we should

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<sup>95</sup> For a summary see T Schillemans, 'Redundant Accountability: The Joint Impact of Horizontal and Vertical Accountability on Autonomous Agencies', *Public Administration Quarterly*, 34, 3, 300–37, 2010 or D Pond, *The Impact of Parliamentary Officers on Canadian Parliamentary Democracy: A Study of The Commissioner of the Environment and Sustainable Development & The Environmental Commissioner of Ontario*, Canadian Study of Parliament Group, 2010.

<sup>96</sup> Kirkham, n. 94.

be realistic, and aware of the limitation and dangers attached, should an ombudsman's functions be expanded. While there are several considerations that must be taken into account, in conclusion, the present study proposes that the ombudsman is specifically designed to protect the public from the government wherever necessary and therefore this should remain its primary and priority function. As a young institution, there is a tendency that it might try to do new things and be stretched too far. In particular, the ombudsman would not benefit from too diversified role which would detract the ombudsman from its original function and inhibit specialization and expertise that should be achieved. In this regard, Pearce has suggested that it is important that the ombudsman's resources must not be spread too thinly. Therefore the ombudsman must be prepared to decline jurisdiction that is incompatible with the performance of his obligation to deal with citizens' complaints or where the new role may be likely to detract from the core role of the office. By doing so, the ombudsman can best ensure its continuing public support, while preserving its overall credibility in the eyes of the executive.<sup>97</sup> The research in this chapter has identified a number of challenges and opportunities facing ombudsman schemes and there is a clear need for individual schemes and the ombudsman community as a whole to develop their strategic thinking in response. These issues will be returned to throughout Part 2 of the thesis which covers the problems that have surrounded the operation of the Thai Ombudsman in its first fifteen years.

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<sup>97</sup> Pearce, n. 67, at 78.

## **PART II – THE THAI OMBUDSMAN**

## Introduction

‘An ombudsman cannot be bought off the peg; it must be made to measure.’<sup>1</sup>

Scholars occasionally point out that an ombudsman is an example of a public sector institution that has been successfully transplanted into many different legal systems around the world.<sup>2</sup> However, scholars have also observed that there are no direct transplants.<sup>3</sup> In the words of Gregory, ‘[e]very country needs to tailor-make its own version of the office to suit its own specific need and circumstances’.<sup>4</sup> One constant theme during the study of an ombudsman is the acquisition of new roles for the institution, a trend that is associated with the adaptation of the concept to suit a wide range of political and constitutional contexts.<sup>5</sup> The Ombudsman in Thailand is a very good example of this phenomenon.

Thailand established the Office of the Ombudsman in 1997 to provide justice for people who have been treated unfairly by all types of civil servants or state employees.<sup>6</sup> This role falls within what is widely recognized as the traditional role of an Ombudsman. The 2007 Constitution<sup>7</sup>, passed after the Ombudsman was originally introduced, assigns two additional roles to this position: (i) to oversee the ethical practice of politicians and government officials and (ii) to follow up, evaluate and provide recommendations regarding implementation of and compliance with constitutional provisions by government bodies. As a result, in the case of Thailand the scope of its mandate is significantly enlarged and differs from its counterparts.

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<sup>1</sup> S A de Smith (Constitutional Commissioner for Mauritius), *Mauritius Legislative Assembly Sessional Paper*, No. 2, 1965, para. 39.

<sup>2</sup> For example, J S Bell, ‘Administrative Law in a Comparative Perspective’, in Esin Örtücü & David Nelkin (eds.) *Comparative Law: A Handbook* 287, Hart, Oxford, 2007, at 299; and J S Bell, ‘Comparative Administrative Law’, in Mathias Reimann & Reinhard Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, 2006, at 1259, 1278.

<sup>3</sup> Mary Seneviratne, *Ombudsmen: Public Services and Administrative Justice*, Open University Press, Buckingham 2002, p. 13-14.

<sup>4</sup> Roy Gregory, ‘Building and Ombudsman Scheme Statutory Provisions and Operating Practices’, in Linda C Reif (ed.), *The International Ombudsman Anthology*, Kluwer Law International, the Hague, 1999, at 130.

<sup>5</sup> K J Keith, ‘Development of the role of the Ombudsman with reference to the Pacific’, 22<sup>nd</sup> *Australasian and Pacific Ombudsman Regional (APOR) Conference*, Wellington, New Zealand, 9-11 Feb 2005.

<sup>6</sup> The Constitution of Thailand B.E. 2540 (1997), Part 7 Sections 196-8; and Borwornsak Uwanno, *the Spirit of the Constitution*, 10 October 2011, p. 52, retrieved 3 October 2013, [http://library2.parliament.go.th/giventake/content\\_cons40-50/cons2540/cons40-intention2.pdf](http://library2.parliament.go.th/giventake/content_cons40-50/cons2540/cons40-intention2.pdf).

<sup>7</sup> Section 244 (2) and (3).

The central roles of the Thai Ombudsman are the investigation of maladministration within the public service and government agencies and the provision of recommendations in relation to that maladministration. This part of the thesis examines the Thai Ombudsman's functions with a view to assessing its roles, effectiveness and limitations. The argument of this thesis is that while Thailand can and should create an ombudsman scheme that best suits its particular needs and circumstances, the assignment of additional roles must be undertaken following a proper understanding of the ombudsman concept, including its optimal design features and limitations. Besides the practical risks of overloading the Office with roles it cannot realistically fulfill, there are theoretical questions about whether or not the roles allocated fit the core ombudsman model. Along these lines, a big issue in Thailand is whether it is appropriate for a traditionally non-political institution, such as the Ombudsman, to become involved in the supervision of the ethical standards of politicians.

Part II is divided into four chapters. Chapter 5 looks at the contextual background and the constitutional and legislative framework of the institution. In doing so, the reasons for the establishment of the Thai Ombudsman Office and the mandate that has been allocated to it will be identified. Chapter 6 and 7 examines how the Thai Ombudsman Office operates based on its real performance and activities. The study will include empirical enquiries exploring available evidence e.g. reports, literature, statistics etc., and is supplemented by elite interviews with the current incumbents and high ranking officers of the Ombudsman Office, members of the 2007 Constitution Committee, Inspectors General and leading academics in public law. Chapter 8 focuses on the Thai Ombudsman's institutional features, in terms of its legal arrangements and how they are implemented in reality. The findings will be considered with reference to the checklists of features of the traditional ombudsman developed previously in Chapter 3. The purpose of this exercise is to determine whether the Thai Ombudsman Office possesses sufficiently robust institutional design features necessary for a successful office or for an ombudsman to perform effectively.



## **Chapter 5**

### **The Thai Constitution and the Thai Ombudsman**

This chapter seeks to provide an overview of the constitutional background and the establishment of the Ombudsman in Thailand. It is argued that on paper, at least, the 1997 Constitution<sup>8</sup> represented an interesting evolution of the separation of powers idea, as discussed in Chapter 2 of this thesis. The office of the Ombudsman was established following the adoption of the 1997 Constitution, which also introduced for the first time several other independent oversight organisations. Together with these overseeing bodies, the Ombudsman was designed to provide an effective ‘checks and balances’ system. This system, in turn, was designed to strengthen government accountability and prevent the accumulation of excessive power or inappropriate exercise of power by the executive branch of governance.

This whole thesis focuses on one aspect of the constitutional innovation of 1997, with this chapter in particular identifying the specifics of the constitutional role which was allocated to the Ombudsman. Chapter 5 is sub-divided into four sections. The first section begins with a brief account of the state of the governance in Thailand which is characterised by the concentration of power in the executive branch and the expansion of the administration. The second section gives a historical overview of how the Thai Ombudsman Office came into existence and its evolution. The third section mainly details the constitutional roles of the Ombudsman, and the purposes as well as expectations that were placed on the Ombudsman. The fourth and final section offers a brief conclusion to the chapter and summary of issues that need to be explored further.

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<sup>8</sup> Hereafter the 1997 Constitution.

## 5.1 Political and social setting

### 5.1.1 General background

It is not the place here to discuss in detail the Thai political and social background which has already been thoroughly discussed elsewhere.<sup>9</sup> For the purpose of this study, three important aspects of the Thai governance will be highlighted. They are: the tendency towards military interventions; executive dominance and strong bureaucracy; and administrative reform. These aspects are specifically chosen because they are the most relevant in the context of this thesis.

#### ***Military rule and the struggle for democracy***

It has been 80 years since a military-led coup brought an end to absolute monarchy in 1932 and instituted in Thailand a constitutional state with a western liberal democratic form of government. However, even now the country's democracy is said to be still stuck in its infancy.<sup>10</sup> The civilian governments since then have been repeatedly overthrown by military force in the form of coup d'état. Each successful military intervention has usually resulted in a dissolved parliament, suspended political activities and abrogation of the existing constitution and a promulgation of a new constitution, in which a self-amnesty provision is put in place,<sup>11</sup> made by leaders of the military coups to preserve their power. At a later stage, mass uprising against the military rulers, even where initially suppressed violently, have usually forced the military rulers to step down and bring about the return of democratic government.<sup>12</sup> Too often, though, the democracy that has

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<sup>9</sup> For example, Surin Maisirikrod, 'The Making of Thai Democracy', in Anek Laothamatas (ed.), *Democratization in Southeast and East Asia*, Institute of South East Asian Studies, Singapore, 1997, pp. 141-167; James Okey, *Making Democracy: Leadership, Class, Gender, and Political Participation in Thailand*, University of Hawaii Press, 2004.

<sup>10</sup> Kriangsak Malakul, 'As demands for popular participation rise, Thailand's infant democracy finds itself at a crossroads', *Asianews.it*, 01/20/2014, retrieved 3 September 2001, <http://www.asianews.it/news-en/As-demands-for-popular-participation-rise,-Thailand's-infant-democracy-finds-itself-at-a-crossroads-30084.html>.

<sup>11</sup> For example, the Constitution of the Kingdom of Thailand B.E. 2550 (2007), section 309. 'Any act that its legality and constitutionality has been recognized by the Constitution of the Kingdom of Thailand (Interim), B.E. 2549 (2006), including all acts related therewith committed whether before or after the date of promulgation of this Constitution shall be deemed constitutionally under this Constitution.'

<sup>12</sup> There were two incidents in the Thai history which occurred on 14<sup>th</sup> October 1973 ('the Great Sorrow Day') and 17<sup>th</sup>-20<sup>th</sup> May 1992 (or Black May), see Kittisak Prokati, 'Thailand': 'The "October Movement" and the Transformation of democracy', *Memories and Legacies of a Global Revolt*, Bulletin of the German Historical Institute, Washington, D.C., 2009, 99-102, Khien Theeravit. *Thailand in Crisis: A Study of the Political Turmoil of May 1992*, Chulalongkorn University Print, Bangkok, 1997.

followed an uprising has been fragile and brief. The popular-initiated 1997 Constitution, an outcome of the 1992 uprising against military government<sup>13</sup>, which raised great expectations for political reform was short-lived. Approximately eight years after it took effect, the army staged the 2006 coup d'état against the then prime minister Thaksin Shinawatra, whose Thai Rak Thai Party won a general election of 2001 and 2005, and replaced it with the 2007 Constitution.<sup>14</sup> This halted the process of constitutional reform in Thailand that had begun with the bringing into effect of the 1997 Constitution.<sup>15</sup>

Most recently in May 2014, the Royal Thai Army Commander-in-Chief Prayuth Chan-ocha declared martial law nationwide and triggered a military coup – the twelfth since the establishment of a constitutional monarchy in 1932.<sup>16</sup> In so doing, the military ordered the arrests, interrogation and detention of a number of politicians, anti-coup activists and academics.<sup>17</sup> The coup banned political gatherings, imposed internet censorship and took control of the media. The coup also established a military dominated national legislature which later unanimously voted the army Chief General Prayuth Chan-ocha, the coup leader, as a new prime minister of the country.<sup>18</sup> It partially repealed the 2007 Constitution issued an interim constitution granting itself amnesty and sweeping power, as it ordered the judicial branch and the constitutional independent watchdogs, including the Ombudsman, to continue to operate.<sup>19</sup>

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<sup>13</sup> Kittipong Kittayarak, 'The Thai Constitution of 1997 and its Implication on Criminal Justice Reform', retrieved 7 September 2013, [http://www.unafei.or.jp/english/pdf/PDF\\_rms/no60/ch06.pdf](http://www.unafei.or.jp/english/pdf/PDF_rms/no60/ch06.pdf).

<sup>14</sup> Allen Hicken, 'The 2007 Thai Constitution: A Return to Politics Past', *Crossroads* 19:1, 2007, pp.128-160.

<sup>15</sup> Duncan McCargo, (ed.), *Reforming Thai Politics*, Copenhagen, NIAS, 2002; M H Nelson, (ed.), 'Thailand's New Politics', *KPI Yearbook 2001*, King Prajadhipok's Institute and White Lotus Press, Nonthaburi and Bangkok, 2001, p. 219-81.

<sup>16</sup> Greg Botelho, Paula Hancock and Kocha Olam, 'Thai military takes over in coup – again', CNN, 22 May 2014, retrieved 7 October, [http://edition.cnn.com/2014/05/22/world/asia/thailand-martial-law/index.html?hpt=hp\\_t2](http://edition.cnn.com/2014/05/22/world/asia/thailand-martial-law/index.html?hpt=hp_t2); 'คสช. ประกาศสิ้นสุด รธน. คงอำนาจ สว.' (NCPO suspends constitution, maintains the Senate, in Thai), *Post Today*, 22 May 2014, retrieved 7 October 2014, <http://www.manager.co.th/Politics/ViewNews.aspx?NewsID=9570000057200>; and 'Shinawatra one of 100 leaders summoned in Thai coup', *Manager*, 24 May 2014, retrieved 7 October 2014, <http://www.irishtimes.com/news/world/asia-pacific/shinawatra-one-of-100-leaders-summoned-in-thai-coup-1.1806993>.

<sup>17</sup> Geoff Wade, 'The Thai coup amid broader concerns', *Flagpost*, 27 May 2014, retrieved July 2014, [http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/FlagPost/2014/May/Thai\\_Coup\\_2014](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2014/May/Thai_Coup_2014).

<sup>18</sup> 'Coupe leader General Prayuth Chan-ocha is Thailand's new PM', *Southeast Asia Post*, 21 August 2014.

<sup>19</sup> 'รวมประกาศ-คำสั่งคณะรักษาความสงบแห่งชาติ' (A collection of NCPO announcements and orders), (in Thai), *The Manager*, 22 May 2014.

### ***Imbalance of power***

The system of the National Assembly or the Thai legislative branch was modeled after the Westminster system, and in times of democratic rule the trend towards executive dominance (discussed in Chapter 2) is reflected well in the Thai situation.

The legislative branch of government consists of the two legislative bodies: the House of Representatives and the Senate. The Prime Minister usually is the leader of the largest party or the largest coalition party in the lower house of Parliament, selected first by an election in the lower house then officially appointed by the King. The legislature can forcefully remove the Prime Minister and members of his cabinet by a vote of no-confidence against, if the legislature has sufficient votes. The legislature can remove the Prime Minister and members of his Cabinet by holding a vote of no-confidence. On the other hand, the Prime Minister has the power to dissolve the National Assembly.

In reality however opposition parliamentarians are seen as having little chance of winning a no-confidence vote because they lack a majority in the lower house, and party discipline ensures that the executive will receive support from the controlling party.<sup>20</sup> In one of the most recent votes of no-confidence on 28 November 2011 against the Justice Minister, Pracha Promnok, the Minister survived with a result that showed no sign of a free vote, demonstrating that party discipline is still enforced strongly.

In fact, since the adoption of a democratic parliamentary system of government 81 years ago, many motions of no-confidence have been lodged, but no government or government minister has yet been removed as a result of such a vote. This does not mean that vote of no-confidence has no effect at all but due to the party discipline its direct effect as envisaged by the Constitution has been limited

In addition, though separation of powers theory would have it that Parliament legislates and government executes, in practice bills can be brought for parliamentary deliberation in many ways. As has happened in Thailand, the 2007 Constitution

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<sup>20</sup> This can be seen during the tenure of Thaksin Shinawatra after the Thai Rak Thai Parties won approximately two-thirds of the popular vote and an increased parliamentary majority, enabled to forestall any parliamentary no-confidence vote. See Martin Painter, 'Managerial Reform and Political Control: the Case of Thaksin and the Thai Bureaucracy', Department of Public and Social Administration, City University of Hong Kong, 2005, retrieved 3 February, 2014, [http://www.sog-rc27.org/Paper/Scancor/Martin\\_Painter.doc](http://www.sog-rc27.org/Paper/Scancor/Martin_Painter.doc); Borwornsak Uwanno, *Economic Crisis and Political Crisis in Thailand: Past and Present*, King Prajadhipok's Institute, Nontaburi, 2009, pp. 132-135.

allows the Council of Ministers (collectively) to introduce a Bill (Section 142 (1)). In addition, a Money Bill requires endorsement by the Prime Minister before it can be submitted (Section 143). The Council of Ministers also has the power to issue an Emergency Decree, which has the force of an Act, when the Council is of the opinion that there is an emergency and the necessary urgency of the situation makes the passing of the decree unavoidable (Section 184). As a matter of fact, most enacted laws are initiated by the government. A government-sponsored Bill has seldom failed as the opposition can rarely defeat a government Bill.

This condition in which the party who won most seats has total control of both the legislature and the executive has prompted concern over the weakening scrutiny of the executive by the legislative branch.<sup>21</sup> This led to an effort to create constitutional mechanisms to promote accountability and transparency, in addition to parliamentary scrutiny, which eventually resulted in the establishment of the oversight bodies free of political influence under the 1997 Constitution.

### ***Strong bureaucracy***

Thailand has been described as a “bureaucratic polity,”<sup>22</sup> to emphasise the autonomy in which the state has traditionally functioned without much political interference and public scrutiny. The growth of bureaucracy in Thailand can be traced back to the reformation of the administrative system during the reign of King Rama V, when western-model ministries were set up to be responsible for various new governmental functions. The civil service administration continued to expand following the implementation of the welfare state policy initiated by the revolutionary coup in the 1930s and the nation’s ambitious economic plan introduced in the 1950s. While other sectors such as political parties, a strong civil society, and public interest groups were less developed, the Thai bureaucracy, consisting of civil administrators, has steadily grown unchallenged in both size and power and is seen as the prominent institution of modern Thailand.<sup>23</sup> The Thai government has been

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<sup>21</sup> For example, Pornsan Liangboonlertchai, a law lecturer, said parliament was being negatively portrayed as having become a ‘parliamentary dictatorship’ or ‘dictatorship of the majority’, which could be seen as a move to prevent the legislative branch from exercising its power, *The Nation*, 7 September 2013.

<sup>22</sup> Fred Riggs, *Thailand: The Modernization of a Bureaucratic Polity*, University of Hawaii Press, Honolulu, 1966.

<sup>23</sup> E L Short, ‘The Thai Bureaucracy’, *Administrative Science Quarterly*, Vol. 5, No.1, June, 1960, p. 70.

said to traditionally be controlled by the army and the bureaucracy.<sup>24</sup> One observer has even said that the Thai polity has been more bureaucratic than democratic.<sup>25</sup>

Throughout the country's frequent changes in government and constitutions, the nation's public administration has been maintained by Thai bureaucrats. Since the 1950s Thailand's rapid economic growth, including important accomplishments in areas such as macroeconomic management, infrastructure development and social development, could be attributed to the achievements of the bureaucracy in initiating and developing state policy. However, the sheer volume of decisions that these public officials have to make, and make without delay, raises significant challenges.

Given the variety of complex and often technical decisions made by administrative decision, as in other countries around the world, there is a concern in Thailand that the legislative branch cannot by itself act as an effective mechanism of control over the overall operations of the executive, especially when the bureaucracy possesses superior information, expertise, and technological and other resources.<sup>26</sup> Besides, the parliamentary means of monitoring the executive branch are not designed for the scrutiny of day to day administrative operations. Bureaucratic accountability is thus limited to hierarchical responsibility, while the internal controls by rules and disciplinary measures for administrative misconducts are reported to have been applied leniently.<sup>27</sup> The constitution was initially constructed to solve this problem with the setting up of the Administrative Court. However, the drafters of the Constitution took a view that the Administrative Court has its own limitations<sup>28</sup> and many disputes that result from the exercise of the administrative discretion are outside its jurisdiction.<sup>29</sup>

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<sup>24</sup> Rungson Thanapornpun, *Economic Policy Process in Thailand*, Kobfai, Bangkok, 2003; Borwornsak Uwanno, Dynamics of Thai Politics, paper presented at Thailand Relationship and Southeast Asia Seminar, the Royal Thai Embassy, The United States, 9-10 May, 2007; Asian Development Bank, *Governance in Thailand: Challenges, Issues and Prospects*, April 1999, retrieved 23 October 2012, [www.asianlii.org/asia/other/ADBLPRes/1999/1.pdf](http://www.asianlii.org/asia/other/ADBLPRes/1999/1.pdf).

<sup>25</sup> Bidhya Bowornwathana, 'Administrative Reform and Regime Shifts: Reflection on the Thai Polity', *Asian Journal of Public Administration*, Vol. 16, No. 2, December, 1994, pp. 152-164.

<sup>26</sup> For more discussion on this subject see R S Lorch, *Democratic Process and Administrative Law*, revised edition, Wayne State University Press, Detroit, 1980.

<sup>27</sup> Borwornsak Uwanno, *Public Law Vol. 2: The Separation between Private-Public Law and the Evolution of Public Law in Thailand*, Nitthitham, Bangkok, 1994, pp. 222-223.

<sup>28</sup> For example before proceeding to the Administrative Court, other venues of redress must have been exhausted.

<sup>29</sup> For example if the discretionary power is exercised lawfully there is no opportunity for the court to intervene; in consequence administrative decisions cannot be challenged on merit grounds alone. See Peter Leyland, 'Droit Administratif Thai Style: A Comparative Study of the Administrative Court in Thailand', *Australian Journal of Asian Law*, Vol. 8, No. 2, 2006, pp. 15-16.

While Thailand has moved towards rapid economic development<sup>30</sup>, the political system has lagged behind due to many political crises. Thus by the end of the last century the bureaucratic system had largely operated free from proper reform<sup>31</sup> or effective modernisation<sup>32</sup> which resulted in many problems in the public sector.<sup>33</sup> In the 1980s, concerns were expressed over the performance of the administrative branch. The major problems identified by leading public law scholars were its overlapping expanded functions; the lack of responsiveness and accountability to the citizenry; a preoccupation with particular units of administration; an inability to consider the process of governance in a holistic manner; an indifference towards the feelings or the inconvenience of individual citizens.<sup>34</sup> Another contributory factor towards the perceived under-performance in the public sector has been the fact that, civil officials have enjoyed prestigious status for several years, first as the King's representatives under the absolute monarchy regime and then during the succeeding democracy government, in return, civil officials have not been trained to be accountable or responsible for their actions to the people.

Problems in administration have also led to outcomes perceived as problematic in the private sector. A number of regulations currently in operation are deemed by many as unnecessary and cause undue difficulties for the private sector.<sup>35</sup> It is found that rules and regulations were made primarily to facilitate the administrative operation of performance. Further, due to various regulatory agencies, administrative rules and regulations in some areas are overlapping and conflicting. It is alleged that the confusion caused by over-regulation has on several occasions led to demonstrable damage in the private sector, such as in the control of private

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<sup>30</sup> Thailand had rapid agricultural and economic growth over three decades from the 1960s to the 1980s. Throughout much of this period the GDP grew at 7 to 8 percent and agricultural GDP at 4 to 5 percent, see FAO, 'Rapid growth of selected Asian economies. Lessons and implications', retrieved 5 January 2014, <http://www.fao.org/docrep/009/ag087e/ag087e06.htm>.

<sup>31</sup> Bidhya Bowornwathana, 'Thailand: Bureaucracy under Coalition Governments', in John P Burns and B Bowornwathana (eds.), *Civil Service Systems in Asia*, Edward Elgar, Cheltenham, 2001, pp. 281-318.

<sup>32</sup> Thosaporn Sirisumphand, Office of the Public Sector Development Commission, speech at the United Nations Public Service Day Celebration, June 2009, New York, retrieved 9 June 2013, <http://unpan1.un.org/intradoc/groups/public/documents/un-dpadm/unpan035259.pdf>.

<sup>33</sup> This section is based largely on Phokin Palakul and Chanchai Swangsak, *Public Law and Bureaucratic Reform in the Age of Globalization (in Thai, กฎหมายมหาชนกับการปฏิรูประบบราชการในยุคโลกาภิวัตน์)*, Nitthitham, Bangkok, 1998, pp. 49-62.

<sup>34</sup> Uwanoo, *Public Law Vol. 2*, n. 27, pp. 222-223.

<sup>35</sup> *ibid.*

businesses or professions.<sup>36</sup> It is in this context that the strengthening of transparency at all levels is imperative, not only to curb the arbitrary use of public powers but also to cater to public needs.<sup>37</sup>

### ***Administrative reform***

The movement for administrative reform in Thailand after democracy started in 1992, demanding more democratization, transparency, and people's participation. This move resulted in a number of statutory frameworks governing bureaucratic actions being worked out and successfully brought into force. The two main legislations aimed at enhancing the administrative transparent decision making process and right to information are: the Administrative Procedure Act B.E. 2539 (1996) and the Official Information Act of B.E. 2540 (1997) respectively.

The Administrative Procedure Act B.E. 2539 (1996) is the first general administrative procedures act which limits and regulates as well as rationalizes the discretionary powers of officials in issuing administrative orders affecting the rights and freedom of any individual. The purpose is to establish general and transparent rules and procedures in decision making processes for all government agencies, in order that administrative practices be transparent, effective, unbiased and fair. The Act is an important measure to prevent the arbitrary use of discretionary powers by public officials.

The Official Information Act of B.E. 2540 (1997) was enacted on the principle that under the democratic system, the people's right to know official information is a basic right under the law. It is deemed necessary for people to have an opportunity to know about the information regarding the operation of state agencies so as to be able to express opinions and use political rights correctly. The Act establishes the method for people to have access to official information. It prescribes for the criteria, means, and details as to the disclosure of information, which is different from those circumstances which happened in the past. The Act promotes the transparency and accountability of public agencies and supports peoples participation in the formation of government on the one hand, while on the other hand, protects personal data and privacy.

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<sup>36</sup> *ibid*; also see Palakul and Swangsak, n. 33, pp. 49-62; Songkhla Vijaikadka, 'An Overview of Public Administration Reform in Thailand', 2004, retrieved 9 June 2012, [http://www.lawreform.go.th/lawreform/index.php?option=com\\_content&task=view&id=126&Itemid=12](http://www.lawreform.go.th/lawreform/index.php?option=com_content&task=view&id=126&Itemid=12).

<sup>37</sup> *ibid*.



This subsection has shown the specific problems facing Thailand and efforts to overcome such problems. Nevertheless, these problems have continued to persist and been identified as part of the causes of the turbulent social-economic landscape of Thailand which led to the constitutional reform and the promulgation of the 1997 Constitution.

### 5.1.2 Constitutional reform

Since the transformation of the political regime from absolute monarchy to democracy, the major problems facing governance in Thailand have been corruption and the inefficiency and instability of the government.<sup>38</sup> The lack of transparency and accountability in government gave rise to the movement for comprehensive political reform to solve the problems.<sup>39</sup>

In the early 1990s, the demands for institutional reform within intellectual communities led to a wider public constitutional discourse which ultimately culminated in the drafting of an entirely new constitution.<sup>40</sup> The demand for a new constitution was fuelled by the spectacular economic crisis in 1997 as businessmen, civil society, urban middle class as well as the rural population blamed the crisis on mismanagement by politicians.<sup>41</sup> Eventually the constitution drafting and debate processes took place within the context of the financial crisis in 1997. The Constitution was drafted with an unprecedentedly high popular participation in the process, with many organisations consulted on a nationwide basis before formal codification was undertaken and when the Constitution was promulgated, it received nationwide support.<sup>42</sup>

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<sup>38</sup> James R Klein, *The Constitution of the Kingdom of Thailand, 1997: A Blueprint for Participatory Democracy*, Working Paper No. 8, The Asia Foundation Working Paper Series, March 1998, p. 9, retrieved 3 December 2013, [http://www.constitutionnet.org/files/Paper\\_on\\_the\\_1997\\_constitution\\_2.pdf](http://www.constitutionnet.org/files/Paper_on_the_1997_constitution_2.pdf).

<sup>39</sup> See Michael K Connors, 'Political reform and the state in Thailand' *Journal of Contemporary Asia*, Volume 29, Issue 2, 1999; Prudisan Jumbala, 'Thailand: Constitutional Reform amidst Economic Crisis', *Southeast Asian Affairs*, Singapore, 1998, pp. 269.

<sup>40</sup> Uwanoo, *The Spirit of the Constitution*, n. 6.

<sup>41</sup> For political context, see McCargo, n. 16; Duncan McCargo, and Ukrist Pathmanand, *The Thaksinisation of Thailand*, Nordic Institute of Asian Studies, Copenhagen, 2005.

<sup>42</sup> For example, there were 23 scholars from various fields of expertise, and 76 provincial, representatives selected from among lists of nominees chosen by the people of each province. It may seem that the "people's constitution" aspect of this Constitution is perhaps overemphasised. However when compared with Thailand's past constitutions which had been drafted privately by small military or political cliques, it is appropriate to applaud the comparatively open process and broad participation that produced the 1997 constitution, more discussion see Borwornsak Uwanoo and

The 1997 Constitution had been devised to overcome Thailand's chronic problems of political corruption, bureaucratic polity, and government instability.<sup>43</sup> The Constitution contained measures designed to strengthen civil society, to help scrutinise politicians, enhance the efficiency and stability of elected governments, and create a carefully crafted checks-and-balances system, to ensure transparency and accountability of the government at all levels.<sup>44</sup> This section focuses on only two measure introduced by the 1997 Constitution: the setting up of an array of independent oversight institutions and the recognition of the principle of good governance.

### ***Independent constitutional watchdogs***

The new, complex set of independent institutions were intended to supplement the gaps in the existing check and balance system, which were considered insufficient to control the exercise of state power. In the words of Borwornsak Uwanno, a drafter of the 1997 Constitution:<sup>45</sup>

The classical notion of separation of powers into the three branches of the executive, the legislature and the judiciary is necessary but not sufficient. The Thai Constitution goes further in instituting a fourth branch – various constitutional controllers have been established in such a way as to give them constitutional controllers have been established in such a way as to give them legitimacy to control, and have been vested with substantial control powers with which to perform their duties. These bodies are the fourth power to be added to the Montesquieu Doctrine because they exercise substantial and effective checks and balances over the other three classical branches.

Accordingly a new set of watchdog organisations were set up under the 1997 Constitution. The Election Commission (Sections 136-48), the National Counter Corruption Commission (Sections 297-302), and the State Audit Commission (Section 312) were each designed to oppress particular aspects of malfeasance and corruption. The Human Rights Commission (Sections 199-200) was intended to protect human rights and inspect human rights violations. A system of administrative courts (Sections 276-80) and the Ombudsman (Sections 196-98) were introduced to

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Wayne D Burns, 'The Thai Constitution of 1997: Sources and Process', 32 *University of British Columbia Law Review*, 227, 1998.

<sup>43</sup> *ibid.*

<sup>44</sup> Preamble, the Constitution of Thailand 2540 B.E. (1997).

<sup>45</sup> Borwornsak Uwanno, 'Depoliticising key institutions for combating corruption: The new Thai Constitution', King Prajadhipok's Institute, 2000, p. 190, retrieved 4<sup>th</sup> December 2013, <http://press.anu.edu.au/wp-content/uploads/2013/03/ch11.pdf>.

further protect citizen's rights by extending the range of remedies available. Finally, the whole constitutional scheme was guarded by the Constitutional Court (Sections 255-70) which controls the constitutionality of laws, decides disputes regarding the powers and duties of constitutional organs, as well as the removal of public officials.

These independent bodies were designed to have different mandates and powers so as to complement each other. The purpose of such an arrangement is to constrain the use of power by building a spectrum of control mechanisms to achieve an all-over adequacy of scrutiny.<sup>46</sup> The essence of achieving these offices is that, in their role as constitutional 'watchdogs', they function freely from pressure and control of the government.<sup>47</sup> Therefore they are all subject to the constitutional requirement, expressed in various terms, that they are functionally independent of both the executive and Parliament. The end result is that the Ombudsman stands as one amongst an array of institutional means for supplementing the traditional ways of parliamentary and judicial control over the executive.

Despite the dissolution of the 1997 Constitution, these watchdog bodies, created as part of the Constitution, continue to function under the interim Constitution, mainly in an investigatory capacity; some of them – including the Ombudsman – have more powers under the following constitution, the 2007 Constitution. A former president of the Administrative Court recently stressed the necessity of the independent organisations to examine the use of state power as below:<sup>48</sup>

The separation of powers between the legislative and executive existed in the past. But at present, the executive and the legislature are coming from the same majority; some went to the executive and some to the legislature. Consequently the check and balance of power between each other is gone. It is therefore necessary to establish a mechanism of control by the Constitution.

As mentioned above, though the coup, which took over the state power in May 2014, suspended the 2007 Constitution (except for the chapter on the monarchy) by, the judicial branch and independent constitutional organisations, including the

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<sup>46</sup> Uwanno, *'The Spirit of the Constitution'*, n 6.

<sup>47</sup> Uwanno, 'Depoliticising key institutions for combating corruption', n. 45.

<sup>48</sup> Ackaratom Chularat, Lecture on Concept and Principle of Public Law on 29 November 2013, Bangkok, retrieved 8 January 2014, <http://www.manager.co.th/Politics/ViewNews.aspx?NewsID=9560000148239&Html=1&TabID=2&>.

Ombudsman, have been maintained and continue to operate under the directives of the Army chief Gen Prayuth Chan-ocha.

### ***Administrative reform to good governance***

While the administration has been credited with national development, as discussed above, it was deemed necessary for the Constitution to create a comprehensive system of control bodies that could oversee all aspects of state administration due to its expansion in both size and activities.<sup>49</sup> According to Borwornsak Uwanno, a drafting member of the 1997 Constitution, Thailand has a huge bureaucracy which includes 15 ministries, 207 departments including public enterprises, and 2,668,000 public servants, as well as 585 Acts of Parliament that enable these entities and officials to act. The risk of abuses of power resulting in violation of people's rights and freedoms is therefore high.<sup>50</sup>

A recent study found that the Thai parliamentary redress mechanism is not sufficiently well designed to effectively resolve an individual grievance, due to its focus on completing the required procedure laid down by law, rather than seeking a resolution for the complainants.<sup>51</sup> Besides, there is a concern in Thailand that the legislative branch by itself cannot provide an adequate control over the overall operations of government, as the scope and complexity of government administration has expanded,<sup>52</sup> especially when the bureaucracy possesses superior information, expertise and technological and other resources.<sup>53</sup> As a result, the legislature has become forced to depend greatly upon controls within government and on the professionalism of the public service to ensure integrity and fairness in the exercise of public power.

Bureaucratic accountability is thus limited to hierarchical responsibility, while the internal controls by rules and disciplinary measures for administrative misconduct is reported to have been applied leniently.<sup>54</sup> The idea that an institution such as an Ombudsman could be beneficial first appeared in 1994, with the argument

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<sup>49</sup> Uwanno, '*The Spirit of the Constitution*', n. 6.

<sup>50</sup> *ibid.*

<sup>51</sup> Thailand's House of Representative, *A Study of the assessment of mechanism, process and achievement of resolution for the people*, Secretariat of the House of Representatives, Bangkok, May 2011.

<sup>52</sup> *ibid.*

<sup>53</sup> For more discussion on this subject see R S Lorch, *Democratic Process and Administrative Law*, Wayne State University Press, Detroit, 1980.

<sup>54</sup> Uwanno, *Public Law Vol. 2*, n. 27, pp. 222-223.

made that the complaint mechanism under the executive branch should be transferred to the National Assembly in order that the legislature would be able to control the behaviour and performance of government officials.<sup>55</sup>

The new Constitution brought about many reforms in the Thai public sector. In addition to creating new institutions, such as an administrative court system and the Ombudsman in the field of administrative justice, the requirement for an efficient system of administration to meet people's needs was recognised.<sup>56</sup>

The State shall ensure the compliance with the law, protect the rights and liberties of a person, provide efficient administration of justice and serve justice to the people expediently and equally and organise an efficient system of public administration and other State affairs to meet peoples demand.

In the same year the Constitution was promulgated, the 1997 economic crisis of Thailand had bankrupted the Thai Government. It was necessary for the Thai Government to borrow money from the World Bank and the IMF. The World Bank has made it a condition that any Third World or developing country that wants to borrow money from the World Bank must reform its government in line with good governance principles of the World Bank. In this regard, the Thai Government, in consultation with the World Bank, came up with a plan to reform the Thai bureaucracy. The Office of the Prime Minister's Order on building good governance and society dated August 10, 1999 was issued. It was replaced by Royal Decree on Criteria and Procedures for Good Governance, 2546 B.E. (2003) which was enacted in accordance with the revised Public Administration Act of 2534 B.E. (No.5, 2002) which stipulates that the government must lay out the principles and methods of good governance.

According to the Royal Decree, good governance refers to the administration of government that meets the following objectives:

- 1) government practices that are beneficial to the wellbeing and happiness of the people, peacefulness and safety of society, and provide maximum benefit to the country;

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<sup>55</sup> C Samudavanija, *Legislative Reference Service and Ombudsman*, Report on A Study Trip to the University of Hawaii, NIDA, Bangkok, 9<sup>th</sup>-13<sup>th</sup> April 1973.

<sup>56</sup> The Constitution of Thailand 2540 B.E. (1997), Section 75.

- 2) government practices must meet the objectives of the state, which meant that government agencies must devise operative plans ahead with stated goals, missions, performance indicators;
- 3) government practices must be efficient, substantially contributing to the achievements of missions of the State;
- 4) streamlining of government work so that government services to the public would become faster and more convenient to the public;
- 5) the revision of government agency's functions in accordance with the public administration plan, cabinet policies, budget capacity, the worth of missions, and changing conditions; and
- 6) the evaluation of government work by an independent team in terms of objective accomplishment, client satisfaction, and contribution to mission success.<sup>57</sup>

International donors such as the World Bank encouraged the Thai government to emulate the experiences of countries with new public management (NPM) reforms. As a result, good governance was interpreted as an efficiency problem which suits the NPM reforms that occurred in several developed countries, such as the United Kingdom and New Zealand.<sup>58</sup> In such countries, NPM refers to the introduction of management techniques from the private sector to the public sector. In this regard, practices such as strategic planning, balanced scorecard, performance measurement, managing by results, are all examples of governance.

The 1997 Constitution was replaced by the 2007 Constitution, which reinstated the same principle in Section 74 which reads:

A Government official, official or employee of a government agency, State agency, State enterprise or local government organisation and other State official shall have a duty to act in compliance with the law in order to protect public interests, and provide convenience and services to the public according to the good public governance principle.

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<sup>57</sup> Bidhya Bowornwathana, 'Importing Governance into the Thai Polity: Competing Hybrids and Reform Consequences', in Bidhya Bowornwathana, Clay Wescott (ed.) *Comparative Governance Reform in Asia: Democracy, Corruption, and Government Trust*, Research in Public Policy Analysis and Management, Volume 17, Emerald Group Publishing Limited, 2008, pp.5 – 20.

<sup>58</sup> C Pollitt, and G Bouckaert, *Public Management Reform: A Comparative Analysis*, Oxford University Press, Oxford, 2004; Bidhya Bowornwathana, *Administrative Reform Abroad: The United States, the United Kingdom, France, New Zealand, Japan, and Sweden*, Office of the Administrative Reform Commission, the Royal Thai Government (in Thai), Bangkok; C Hood, 'A Public Management for All Seasons', *Public Administration*, 69:1, Spring, 1991, pp. 3-19.

This subsection has shown that the Constitutional development in Thailand shares commonalities with standard western constitutionalism. The Constitutions of 1997 and 2007 reflect the idea that state power ought to be constrained, embodying basically liberal constitutional structures namely separation of powers, checks and balances among government powers; and enshrining popular sovereignty, rule of law and individual rights.

Despite framework similarities, the Thai constitutional developments have been undertaken to tackle larger political and social transformations. The constitutions contain measures designed to eliminate corruption in public life, provide stable government, and guarantee democracy and human rights. The establishment of the independent institutions in order to check and limit electoral politics reflects the need to introduce far-reaching controls over the exercise of public power. As noted by one authoritative source, it would be: ‘... hard to imagine a more comprehensive attempt to change social facts by law’.<sup>59</sup>

As this thesis was about to reach its final stage in May 2014, Thailand experienced a military coup which has removed the Prime Minister, abrogated the Constitution and placed the nation under military control, bringing a halt to the process of constitutional reform. Though the coup allowed the constitutional watchdogs to remain in operation, it remains to be seen if these bodies will be able to retain their independence. Nevertheless independent watchdogs alone are not enough for maintaining the rule of law and democracy.<sup>60</sup> For democracy to be truly back on track, it is therefore imperative to restore respect of the law on both the State and the people. Hopefully even though the constitutional documents of 1997 and 2007 are currently dormant, the spirit of liberal-democratic development in the constitutions can exert its influence in the Thai politics and continue to be an integral component of the contemporary discussion of law, politics, and society. As this thesis is being finalized, a new constitutional convention has been established to once again rewrite the constitution.<sup>61</sup>

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<sup>59</sup> Andrew Harding, ‘May There be Virtue: New Asian Constitutionalism in Thailand’, *Australian Journal of Asian Law*, 3, 2001, pp. 24–48.

<sup>60</sup> P Nikiforos Diamandouros, ‘The role of the Ombudsman in strengthening accountability and the rule of law’, speech at the Constitution Unit, University College London, 29 November 2005, retrieved 27 February 2010, <http://www.ombudsman.europa.eu/speeches/en/2005-11-29.htm>.

<sup>61</sup> ‘Thai legislature meets after appointment by junta’, AP, 8 August, 2014, Bangkok, retrieved 8 October 2014, <http://bigstory.ap.org/article/thai-legislature-meets-after-appointment-junta>; Royal Thai Embassy, Canada, ‘Latest Development Especially on Drafting of Thailand's New Constitution’, 28

## 5.2 The Thai Ombudsman

As we have seen, the Ombudsman Office came into existence with its adoption by the 1997 Constitution in order to function alongside other independent constitutional organisations to exercise a specialised oversight function. The 2007 Constitution, which replaced the 1997 Constitution, not only retains the Ombudsman Office but entrusts it with a number of important powers and mandates. The following section starts by looking at the essence of the arguments initially being made at that time as to why this new institution should be adopted and what were the hopes and expectations held by the advocates of this institution, since the inherent logic of those arguments is still applicable. It then describes the legislative framework of the Ombudsman institution and its development.

### 5.2.1 The establishment of the Thai Ombudsman

Similar to the situation in other countries, the introduction of the Ombudsman in Thailand was initiated by recognition that there has been an enormous expansion in the scope and dimensions of government activities, and the power and authority of officials in the administration. In the case of Thailand, despite its significant social and economic development in recent years,<sup>62</sup> its political system has remained underdeveloped even while people have become more assertive. Such a conclusion was supported by an increase in the number of complaints received from the public.<sup>63</sup>

Several subsequent studies that supported the establishment of an ombudsman argued that an ombudsman could promote democracy and provide external control over a public administration which has become increasingly more complex.<sup>64</sup> Concern was expressed that conflicts between public organisations and individuals, if not fixed and alleviated in time, could accumulate and lead to severe political problems. The Ombudsman institution, once successfully adopted, was expected to be an independent body capable of controlling the operation of the

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July, 2014, retrieved 8 October 2014, <http://www.thaiembassy.ca/en/about-embassy/news/latest-development-especially-on-drafting-of-thailands-new-constitution>.

<sup>62</sup> Over the period 1968 to 1986, Thailand's real GNP was 6.7 per cent (almost 5 per cent per person), compared with an average of 2.4 per cent for low and middle-income countries (World Bank 1998). Then, over the decade 1987 to 1996 the Thai economy boomed. It was the fastest growing in the world before the crisis started in 1997 until 1999; and from 2000 to 2011, Thai economy recovered at an average of 1.1 percent quarter-on-quarter.

<sup>63</sup> Thirapat Serirangsan, *An ombudsman as an Innovative Idea for Political Development in Parliament System*, Master's Degree Thesis, Chulalongkorn University, 1991, p. 211-294.

<sup>64</sup> Pornsak Phongphaew, *Research Report on Ombudsman: The Transferability of the Parliamentary Ombudsman to the Thai System*, presented to National Research Council of Thailand, Bangkok, 1990.



executive branch, while complementing its role in solving the grievances of the people.<sup>65</sup>

Nevertheless, attempts to establish an ombudsman office in 1974 and 1981 were not successful. The main argument expressed against the setting up of an ombudsman office was that it would not be necessary as there was an intention to establish the Administrative Court.<sup>66</sup> However, it was soon realized that the Administrative Court had its limitations<sup>67</sup> and many disputes that result from the exercise of administrative discretion are outside the Courts jurisdiction.<sup>68</sup> Thus perhaps the strongest argument made for the establishment of the office of the Ombudsman in Thailand was that it would be capable of controlling the fairness and appropriateness of the exercise of state powers and that such a role would not duplicate the work of other control mechanisms, such as the Administrative Court, the Constitutional Court and the National Counter Corruption Commission with roles which are strictly limited to legality review.<sup>69</sup>

The strength of arguments in favour of an ombudsman eventually led to a provision pertaining to the Ombudsman being inserted in the 1995 Constitution; however, the institution was not immediately established.<sup>70</sup> Two years later, the concept was entrenched in the 1997 Constitution, along with other supervising organisations. The first Organic Law on the Ombudsman office, outlining in detail how it would be formed and what its powers would be was published in the Royal Gazette on the 14th of September 1999. According to a survey conducted prior to the establishment of the Thai Ombudsman<sup>71</sup>, most members of Parliament regarded the primary purpose behind establishing an ombudsman office in Thailand as being to find solutions to grievances arising from the operations of public administration. The second priority was to protect the rights of the people from the intrusion and

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<sup>65</sup> Serirangsan, n. 63.

<sup>66</sup> Siriya Promradyod, *The problem of legal status and authority of the Ombudsman under the Constitution of Thailand*, Master's Degree Thesis, Thammasat University, 2010, p. 101.

<sup>67</sup> For example, before proceeding to the Administrative Court, all other venues of redress must have been exhausted.

<sup>68</sup> For example, if the discretionary power is exercised lawfully, there is no opportunity for the court to intervene; in consequence, administrative decisions cannot be challenged on merit grounds alone. See Peter Leyland, 'Droit Administratif Thai Style: A Comparative Study of the Administrative Court in Thailand', *Australian Journal of Asian Law*, Vol. 8, No. 2, 2006, pp. 15-16.

<sup>69</sup> Promradyod, n. 66, p. 101.

<sup>70</sup> *ibid.*

<sup>71</sup> Thirapat Serirangsan, *Attitude of the Member of the Parliaments: Towards the Establishment of the Ombudsman*, the Secretariat of the House of Representatives, Bangkok, 1997.

violation caused by the administrative process and to investigate complaints made by people against the government agencies, respectively.

It can be seen that the foundations of the Ombudsman in Thailand look very similar to those elsewhere in the world, insofar as it was created as a complaint handling mechanism to provide a channel for resolving grievances caused by maladministration. Its main advantage was seen to be the institution's ability to promote justice by looking beyond the narrow limit of legality. In both these respects, arguably the role of the Ombudsman is even more important in the Thai context where political control has not kept up with the growth of the public administration. The next section continues by detailing the Thai Ombudsman's evolving mandate and powers.

### **5.2.2 Evolution of the Thai Ombudsman**

#### ***Original Mandate***

In the 1997 Constitution, the Thai Ombudsman office was established in line with traditional ombudsman schemes, as detailed in Chapter 3. It functioned as a parliamentary ombudsman under the umbrella of the National Assembly. It started off as a constitutional body to safeguard people's rights against the perceived threat of encroaching administration. The Ombudsman's mandate was to handle complaints lodged with it by aggrieved individuals or referred to it by members of the legislature responsible for the redress of grievances. A linked role, which arguably went beyond the traditional ombudsman mandate, was to refer cases to the Constitutional Court or the Administrative Court if he found that any provision of existing law contradicted the constitution.

The original mandate under the 1997 Constitution (Section 197 and 198) which remains the primary mission of the Ombudsman is as follows.

1) Consider and inquire into the complaint for fact-findings in the following cases:

- a. a Government official, an official or employee of a Government agency, a State agency, a State enterprise or a local government organisation fails to perform in compliance with the law or perform beyond powers and duties as provided by the law;

- b. an official or employee of a Government agency, a State agency, a State enterprise or a local government organisation performs or does not perform duties, which unjustly causes injury to the complainant or the public, whether such performance of duties or omission of duties is lawful or not;
- 2) Prepare reports with opinions and suggestions and submit to the National Assembly;
- 3) The Ombudsman may submit the case and the opinion to the Constitutional Court or Administrative Court for a decision in the case where the Ombudsman is of the opinion that:
  - a. provision of the law, begs the question of the constitutionality in which the Constitutional Court shall decide the case submitted by the Ombudsman in accordance with the procedure of the Constitutional Court without delay.
  - b. rules, regulations or any act of any public official begs the question of the constitutionality or compliance with law in which Administrative Court shall decide the case submitted by the Ombudsman according to the procedure of the Administrative Court without delay.

It can be seen, therefore, that the Thai Ombudsman's mandate is similar to those available in other ombudsman schemes that have as a primary function the resolution of administrative grievances. Nevertheless, the drafters of the 2007 Constitution came to the view that the Ombudsman had underperformed during the first seven years of its operation. Further, it seems to have accredited this result largely to the fact that its mandate and power was too limited to enable it to make substantial impact.<sup>72</sup> Instead of finding shortcomings that could have caused poor performance of the Ombudsman Office, the conclusion it came to was that the Ombudsman should have more powers.

One limitation in the original mandate of the Thai Ombudsman when compared to the traditional ombudsman model was the lack of power to initiate investigation without complaints. The 1997 constitution granted the Thai Ombudsman the power to make reference to the Constitutional Court in relation to

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<sup>72</sup> Somkid Lertpaithoon, 'The Origins and Spirit of the 2007 Constitution', in Wutthisarn Tanchai (ed.), *Exploring the 2007 Constitution*, KPI Yearbooks 4, King Prajadhipok's Institute, 2007, p. 23.

the constitutionality of law. But this is a power aimed at protecting the citizens' rights from being adversely affected by unconstitutional law and the Ombudsman cannot rely on this channel to rectify systemic problems in administration. This is because while some legislations, administrative rules, procedures, and practices may cause systemic problems, such problems may not make them unconstitutional. Therefore this power could only result in the improvement of the administration in a few select areas where constitutionality was at issue.

The own-motion investigation power is widely considered important for systemic investigation to tackle generic administrative problems beyond individual grievances and enable an ombudsman to play a crucial role in improving administrative action to the benefit of both public bodies and complainants<sup>73</sup>. Under the 2007 Constitution the power of own-motion investigation was provided for the Ombudsman.

But while the original lack of an own motion power may have been a cause of the underperformance of the Ombudsman Office before 2007, it is contended here that there is evidence to suggest that other factors may have much more negatively affected the effectiveness of the Ombudsman Office. These issues will be discussed further in the following chapters. Having discussed the original mandate of the Thai Ombudsman, the next subsection addresses the additional mandate of the Ombudsman under the 2007 Constitution.

### ***Strengthening the Ombudsman***

A review of the Ombudsman Office took place during the drafting process of the 2007 Constitution in which there were lengthy debates between members about whether the office should be abolished, as it had not demonstrated sufficient concrete results that it could actually help alleviate the grievances of the people.<sup>74</sup> In the words of Prof. Somkid Lertpaithoon, Secretary to the Constitution Drafting Committee: ... performance records were unclear, if not quite up to the mark.<sup>75</sup> Eventually the drafters of the 2007 Constitution took the view that unsatisfactory performance was due to the limited power accorded to the

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<sup>73</sup> The Law Commission, 'Administrative redress: public bodies and the citizen', Consultation Paper No. 187, retrieved 23 October 2013, [http://lawcommission.justice.gov.uk/docs/cp187\\_Administrative\\_Redress\\_Consultation.pdf](http://lawcommission.justice.gov.uk/docs/cp187_Administrative_Redress_Consultation.pdf).

<sup>74</sup> Minutes of the Meeting of the Constitutional Drafting Assembly 2550 B.E. (2007), retrieved 10 October 2013, <http://library2.parliament.go.th/giventake/cons2540-2550.html>.

<sup>75</sup> Lertpaithoon, n. 72, p. 23.

Ombudsman by the 1997 Constitution.<sup>76</sup> With the aim of strengthening the status as well as the impact of the Ombudsman and a desire to impose stricter control over the executive, the drafters of the 2007 Constitution intended that the Ombudsman should be employed not only as a reactive mechanism to safeguard the rights of the people but also to contribute more in inspecting the exercise of state power.<sup>77</sup>

Consequently, a number of significant changes to the Thai Ombudsman scheme were introduced. The 2007 Constitution gives major additional powers and duties to the Ombudsman<sup>78</sup> as follows:

Firstly, the Ombudsman's scope of jurisdiction was widened to cover an investigation on the unlawful performance of duties of various constitutional and judicial bodies (excluding the proceedings of the courts). This expansion of responsibility increased the coverage of the Ombudsman's office beyond its typical jurisdiction. The intention was that administrative acts of all kinds of public officials could be examined by the Ombudsman.

Secondly, the Ombudsman was assigned with the responsibility of monitoring and evaluating compliance with the Constitution's provisions, as well as providing recommendations on necessary constitutional amendments. This power allows the Ombudsman to scrutinize whether the execution of public administration by the executive and its administrative branch is carried out according to the state policy set forth in the constitution.

Thirdly, and more importantly, the Ombudsman has been granted supervision tasks of monitoring ethical conducts of political office holders and government officials. The Ombudsman is empowered to determine alleged breaches of ethical conduct of both the holders of political positions and all kinds of public officials. Identification of an alleged breach leads to initiation of disciplinary action for public officials and the potential removal procedures for persons who hold political positions.

The Constitution also empowers the Ombudsman to initiate investigations into any case without receiving a complaint (own-motion investigation), if the

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<sup>76</sup> *ibid.*

<sup>77</sup> The Ombudsman Annual Reports.

<sup>78</sup> The Constitution of Thailand 2550 B.E. (2007), Sections 244 and 245.

Ombudsman considers that such a case may have an adverse impact on the public or where the safeguarding of the public interest is required.<sup>79</sup>

The expansion under the 2007 Constitution not only has made the Ombudsman a fully-fledged ombudsman in a traditional sense but also markedly extended its jurisdiction beyond the traditional matter of administration to many important aspects concerning the functioning of the political system of the country. The mandate to monitor the implementation of the Constitution is aimed at making sure that the Constitution is fully implemented which in effect is to oversee the development of legislation required to implement the Constitution. However, the decision to legislate is not part of administrative functions but belongs to the government and the legislature. With regards to ethics, complaints may be about the behaviour of a particular public officials or political office holder and not about the administrative services in general.

Because the new jurisdiction includes monitoring ethics of parliamentarians, the Ombudsman has been given a new status which expressly detaches it from parliament. This new status will be discussed next.

### *New status*

The changes under the 2007 constitution have had a further radical impact on the set-up of the Thai Ombudsman. Formerly, the Ombudsman was set-up as a Parliamentary Ombudsman, with all the associated benefits of being branded as an officer of parliament, the central institution of the Constitution. With the advent of the new powers under the 2007 Constitution, such a joint relationship was no longer possible because the Ombudsman is now empowered to examine the ethics of persons holding political positions, which include members of the House of Representatives and the Senate. To reflect this change, the 2007 Constitution relocated the Office of the Ombudsman to Chapter XI, under the heading of Constitutional Independent Organisations, along with other independent accountability mechanisms. This signifies that the Office of the Ombudsman is no longer attached to the National Assembly. Accordingly, the institution has been

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<sup>79</sup> The Constitution of Thailand 2550 B.E. (2007), Section 244.

renamed the Office of the Thai Ombudsman without the term Parliamentary to reflect its new role.<sup>80</sup>

Within a short period of 13 years since its establishment, the Thai Ombudsman, once with a limited agenda and restricted scope of functions, has evolved to become a fully-fledged Ombudsman, which, according to one of the current office holders, is considered to be one of the ombudsman schemes with ‘the most extensive powers anywhere in the world’.<sup>81</sup> It might be thought that proponents of an ombudsman would generally advocate expansion of the powers of the institution, particularly as it has been argued that in many countries the institution is an under-utilised one.<sup>82</sup> Indeed, as noted in Chapter 4, there is evidence around the world of expansion in the use of the institution, a trend which has been viewed favourably in the academic community.<sup>83</sup>

However, unlike ombudsmen in some jurisdictions (such Australia), where the Ombudsmen have built up their public credibility which in turn has provided the impetus for further growth and influence of the office, the Thai Ombudsman’s expansion has arguably come about notwithstanding its previous under-performance. Thus the expansion of powers to the Thai Ombudsman could be viewed more as a combined result of pressures to increase the offices’ credibility and the contingent political demand to strengthen scrutiny over the executive branch. The argument of this thesis is that this approach has led to difficulties in the operation of the office.

### 5.3 Conclusion

The discussion in this chapter has exhibited several key issues confronting the Thai system which are also common problems seen elsewhere in modern states, as identified in Chapter 2. Thus, effective parliamentary scrutiny of the executive is commonly hindered by such things as party politics, executive dominance in the

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<sup>80</sup> Minutes of the Constitutional Drafting Committee Meeting 34/2550 (extraordinary) November 28, 2007, The Secretariat of the House of Representative, Bangkok, 2007, p. 115.

<sup>81</sup> Ombudsman Sriracha Charoenpanich, an interview with the author on 3 March 2013, at the Ombudsman Office, Bangkok.

<sup>82</sup> Trevor Buck, Richard Kirkham and Brian Thompson, *The Ombudsman Enterprise and Administrative Justice*, Ashgate, Surrey, 2011.

<sup>83</sup> Anita Stuhmcke, ‘Discretion, Direction and the Ombudsman: To Steer the Ship or to Choose the Ship?’, Conference Papers, Wellington, 2012, retrieved 15 November 2013, <http://www.theioi.org/publications/wellington-2012-conference-papers>; Rick Snell, ‘Australian Ombudsman: A Continual Work in Progress’, in Matthew Groves and Hoong Phun Lee (ed.), *Australian Administrative Law*, Cambridge University Press, Cambridge, 2007, pp. 100-115.

legislature, and by the growing size and complexity of administrative decision-making and the actions of public officials undertaken on a daily basis. In such a context, the traditional concept of a separation of powers, whether based on a Westminster model or a presidential model, does not of itself provide adequate protection of citizens from abuses of power by members of the executive. In other words, the trend towards the construction of the Thai Ombudsman, including the motivations and theoretical claims made in favour of the office, reflects a common theme in constitutional evolution.

In dealing with its constitutional problems, the Thai Constitution introduced additional constitutional watchdogs. The Ombudsman stands alongside offices exercising complementary functions, which include the office of the National Counter Corruption Commission, the State Audit Commission, the National Human Rights Commission, the Election Commission and the Auditor-General. The debates preceding the creation of the office of the Ombudsman showed that the new office was designed to act on behalf of Parliament with regard to the administrative agencies, strengthening the traditional legislative control exercised by the supreme elective body and its individual members over the executive branch's administrations.

The Thai example exemplified a recent trend in constitutional drafting that at its best involves enhanced efforts to structure and channel democratic power and to limit the role of partisanship, encompassing a myriad of institutions that affect a highly refined separation of powers. Among these oversight bodies, the Ombudsman is the only one that is empowered to deal with citizens' grievances against administrative injustice, especially in areas where there are few or no legal rights, and in which political sanctions fail to provide sufficient coverage in terms of redress. The arguments for the Ombudsman office that were made on its introduction, therefore, chime very closely to those that have been made elsewhere in the world and link with a general claim that all citizens deserve a right to administrative justice.

The 2007 Constitution gives the Ombudsman important new powers: to conduct own-motion investigations to oversee the ethical practice of politicians, government officials or state officials as well as to establish a Code of Ethics to be followed by all public agencies. A second role is to follow up and provide recommendations in compliance with the Constitution, as well as matters for



consideration in support of Constitutional amendment. The reason behind such incremental change is the desire to strengthen the role of the Ombudsman and to increase control over the executive.

The discussion regarding the constitutional roles of the Ombudsman complements further the argument that the Thai Ombudsman is assigned roles that fulfill a function not discharged adequately by other processes in government. The Ombudsman's original mandate in protecting citizen's rights, by resolving complaints against public administration and improving administrative practice should be considered primary roles of the Ombudsman's office, given the power that it has as the only complaint body that can deal with unfairness effectively. On the other hand, the new supervisory roles of the Ombudsman, such as the role regarding the implementation of the Constitution, could overload the Office. Moreover it overlaps with the role of other institutions. The power in relation to ethical codes may be inconsistent with the role and image of the Ombudsman operating in accordance with the primary roles in that it sets the Ombudsman as a potential adversary to leaders, both political and administrative, the very people from whom he is meant to seek support and with whom he is meant to cooperate with. The next chapter will address these issues in more - depth.

## **Chapter 6**

### **The Traditional role of the Thai Ombudsman**

This chapter considers the Thai Ombudsman's functions with reference to the traditional roles of the ombudsman. The chapter has two aims, firstly it identifies that while the 2007 Constitution has given it more powers and a larger mandate to inspect the exercise of state power, the core function of the Thai Ombudsman remains unchanged, that is to remedy administrative abuses and promote fair use of public power. Secondly, it is contended that the Ombudsman has fulfilled this role well, but it should be able to function more effectively in some areas.

Toward this end, this Chapter is divided into three sections. Section 6.1 establishes that resolving grievances and improving good administration have been identified as the primary functions of the Office. Section 6.2 provides a description of the manner in which the Thai Ombudsman's power to remedy grievances and improve administration is structured, followed by a detailed examination of the practical application of his power. Section 6.3 concludes the chapter by highlighting the achievements of and the challenges faced by the Thai office with respect to its traditional role.

The data used to support the study in this chapter and the next two comes from several resources. The main source used is the Ombudsman's official documents, such as the Ombudsman's annual reports, the Ombudsman's files and working procedure papers, speeches, and publications. To support these sources, in this thesis I have interviewed Ombudsman Sriracha Charoenpanich, Chief Ombudsman Panit Nitithanprapas and officers of the Thai Ombudsman Offices to gain an insight into the perception of their work and to supplement the statistical data uncovered on the Ombudsman's office. Various additional sources have been used to gain alternative perspectives on the work of the Ombudsman. Hence, the minutes of Meetings of the House of Representatives, and secondary sources such as the reports of the media, opinions of scholars and administrators have been reviewed in this work. Finally, elite interviews were held with other relevant stakeholders in the

Ombudsman's work. These included interviews with the Vice President of the Senate, an eminent public law scholar/State Councillor and a deputy permanent secretary to the Prime Minister's Office/Inspector General, with the primary purpose of ascertaining their reflections on the performance of the Ombudsman.<sup>1</sup>

## **6.1 The Primary functions**

As discussed in chapter 5, the 2007 Constitution aimed to strengthen the Ombudsman's profile by assigning various functions to the office, but the constitution does not dictate which of the office's functions should take priority. Therefore, before examining the various functions of the Ombudsman, it is interesting to see what the Ombudsman perceived as its primary function and also what is expected from the Ombudsman by key stakeholders. It will be claimed here that what is apparent is that, while the functions and powers of the office have expanded, none of the relevant stakeholders intend that there should be a change to the role of the Ombudsman as an administrative complaint mechanism.

While the Constitution does not expressly address the question of which function should take precedence, it can be deduced that there was no intention under the new constitution to alter the Ombudsman's original purpose of resolving maladministration complaints. Further, it was stated in the drafting of the 2007 Constitution that the principle of the Ombudsman has not been changed.<sup>2</sup>

The evaluation of the Ombudsman from the perspective of the legislature is also important because the original intent in establishing the institution was to supplement and complement the work of the courts and the legislature in the administrative justice system, rather than to supervise the conduct of the executive and government officials.<sup>3</sup> In addition, the legislature's members still play a role in determining the office's future. In this respect, the views of members of Parliament can be obtained in the annual reports of the Ombudsman which in turn throw light on their perspectives on what should be the primary role of the Ombudsman.

Messages from each President of the National Assembly to the Ombudsman are contained in all of the Ombudsman's annual reports since the expansion of

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<sup>1</sup> See an annex for a list of interviewees.

<sup>2</sup> Minutes of Extraordinary Committee Meeting on Intention, Records, Archive and Minutes Scrutiny, Constitutional Drafting Assembly B.E.2550 (2007).

<sup>3</sup> *ibid.*

functions in 2007. These messages have continuously emphasised that the Ombudsman should focus on the alleviation of administrative grievance as its prime responsibility,<sup>4</sup> a thereby the existence of the Ombudsman is to facilitate the promotion and protection of the citizens' right to good administration.<sup>5</sup> Likewise, the messages from both the heads of the House of the Representatives and the Senate after 2007 continue to stress that the ultimate aim of the Ombudsman is to be an institution upon which those who suffer from maladministration can rely for support.<sup>6</sup>

According to Panit Nitithanprapas, the current Chief Ombudsman, the primary duty of the Ombudsman is to protect citizens and improve public administration by addressing administrative problems that the courts, the legislature, and the executive cannot effectively resolve, while the other additional functions given subsequently by the 2007 Constitution are tools to achieve the institution's main duties.<sup>7</sup> The Ombudsman has also set goals to be achieved through their accomplishment, which is to remedy people's' grievances in a proactive manner with an efficient, standardized and just operation.<sup>8</sup> In the Annual Report of 2013, the Ombudsman stated that the success of the Office is in being able to remedy the complaint suffered and to restore fairness to society, as well as make suggestions that lead to change and improvement of the administrative system.<sup>9</sup>

Looking at how the Office is organised also gives us a sense of where the Ombudsman prioritises his resources. The largest share of staff, which is divided among 3 divisions, each comprised of 60 people, works on complaints against maladministration; while division of 32 people work on complaints about ethics including promoting ethics standards; and a division of 11 people deals with constitutional compliance and evaluation.<sup>10</sup>

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<sup>4</sup> Utai Pimchaichon, message from the President of the National Assembly, the Ombudsman Annual Report 2545 B.E. and 2546 B.E. (2002 and 2003).

<sup>5</sup> Phokin Palakul, message from the President of the National Assembly, the Ombudsman Annual Report 2548 B.E. (2005).

<sup>6</sup> Prasobsuk Boondej, message from the President of the Senate, the Ombudsman Annual Report, 2550 B.E. (2008); Somsak Kiatsuranon, message from the President of the National Assembly, General Theeradej Meepien, message from the President of the Senate, the Ombudsman Annual Report, 2552 B.E. (2011).

<sup>7</sup> Chief Ombudsman Panit Nitithanprapas, an interview with the author on 15 March 2013 at the Thai Ombudsman Office, Bangkok.

<sup>8</sup> The Ombudsman Annual Report 2550 B.E. (2008).

<sup>9</sup> Message from the Ombudsman, the Ombudsman Annual Report 2554 B.E. (2013).

<sup>10</sup> Wasan Thepmanee, Public Relations Officer, The Thai Ombudsman Office, an interview with the author on 15 March 2013 at the Thai Ombudsman Office, Bangkok.

After identifying that the central purpose of the Thai Ombudsman is to investigate complaints from the public alleging injustice due to maladministration and to improve the administrative practices of local authorities, it can be seen that the Ombudsman in Thailand still shares a similar mission to other ombudsman schemes. As discussed in chapter 3, this might lead to a conclusion that, in examining the Thai Ombudsman's operation and institutional design (though this study does not intend to make direct comparison), some comparisons with other ombudsman schemes or taking reference from overseas practices are therefore very relevant if the core mission is much the same.

Nevertheless, despite the similarities with other ombudsman schemes, there are three special functions of the Thai Ombudsman that set it apart from equivalent institutions in other countries. In most other countries, ombudsman institutions do not have this spread of responsibilities, and these additional functions will be discussed in detail in the next chapter. As already noted, direct comparisons are not always appropriate, and each country's unique historical, cultural, social, economic and political environment should be considered carefully before drawing any conclusions about the best way forward. The study now turns to look at first the performance of the Thai Ombudsman when carrying out the primary function.

## **6.2 Traditional role**

The traditional role of the ombudsman was analysed in Chapter 3 and is generally understood to comprise the resolution of individual complaints with a view to assisting citizens in pursuing their grievances against public bodies, and to promote good administrative practice by uncovering and eradicating administrative system failures that cause widespread or individual maladministration. The delivery of these dual traditional roles by the Thai Ombudsman is examined in more detail below, but first the powers of the office under the constitution and supporting legislation are outlined.

### **6.2.1 Powers available to the Thai Ombudsman**

For any ombudsman scheme to be effective in delivering its goals it requires adequate statutory support and appropriate working arrangements. In this section

these arrangements in Thailand are explored. The discussion first covers resolving complaints about government administration, and then turns to recommendations for improving administration.

***(i) Resolving complaints about government administration***

Section 244 (1) of the 2007 Constitution and Section 13 (1) of the Organic Act on the Ombudsman 2552 B.E. (2009)<sup>11</sup> stipulate that the Ombudsman has the power and duties to consider and investigate the facts of complaints against all types of government officials in cases involving: 1) failure to perform in compliance with the law or performance beyond powers and duties as provided by the law; and 2) performance of, or omission to perform, duties which unjustly causes injury to the complainant or the public, whether such act is lawful or not.

According to the above provisions, the Ombudsman must assess whether there is ‘failure to perform in compliance with the law, beyond power and duties as provided by the law’ or if there are ‘unjustly caused injuries’ and whether such is lawful or not. This statutory definition indicates that the Ombudsman performs both legality and non-legality reviews.

The capacity to look into contraventions of the law and at bodies exceeding jurisdiction potentially overlaps with the territory policed by the Administrative Courts in performing their judicial review function. However, the ombudsman's role extends beyond considering narrow questions of legality as the other grounds for review are ‘injuries’ which are unjustly caused by an administrative action ‘whether such act is lawful or not’.

The Ombudsman therefore has the power to determine whether there is a case of maladministration, as occasionally even if an agency complies strictly with its legal powers, it is possible that the end result causes losses and unfairness. In such cases, action taken by public authorities or officials may be consistent with the law in a narrow sense and yet constitute bad administration.

This non-legality review function adds to the surveillance capacity of Parliament, as well as provides additional supervision on the substance of discretionary decisions that cannot be achieved in a court. In such a case the person affected by the administrative decision often has no legal right to seek redress in the courts while, as mentioned above, Parliament on its own could not provide the

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<sup>11</sup> Hereafter the 2009 Act.

necessary continuous surveillance of the vast range of administrative decision-making and actions affecting individual citizens.<sup>12</sup> The Ombudsman's task of non-legality review expands the degree of control over an administrative action beyond legality and therefore provides citizens with a greater chance to obtain justice in their dealings with bureaucracies.

***(ii) Recommend amendment to improve administration***

The Ombudsman has the power to recommend changes to legislation and practices to terminate administrative problems. The 2009 Act stipulates that the Ombudsman has the power to recommend amendments to any act of the legislature or subordinated legislations that have produced objectionable results such as unfairness, discrimination, or inequality.<sup>13</sup>

The provision makes it explicit that the Ombudsman can go beyond the merits of each individual complaint to a broader area of administrative fairness, by identifying defects in the law that are a common source of complaints from the community, and assisting agencies to rectify them in order to prevent any recurrence of similar situations.

In fact it can be seen that the law encourages the Ombudsman to embark on a 'systemic investigation' on his own initiative. The 2007 Constitution, Section 244, provides that '...in the case where Ombudsmen consider that such act threatens to cause injury to the public at large or there arises a need to safeguard public interests, Ombudsmen may consider the matter and conduct inquiries without prior complaint'. Therefore the Ombudsman is an independent fact-finder who can recommend changes that would lead to a greater administrative fairness in the public sector.

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<sup>12</sup> Siriya Promradyod, *The problem of legal status and authority of the Ombudsman under the constitution of the kingdom of Thailand*, Master's Degree Thesis, Thammasat University, 2010.

<sup>13</sup> Section 32, paragraph two, 'In the case where the Ombudsman is of the opinion that despite an act of a government official, official or employee of a government agency, State agency, State enterprise or local government organization being compliant with the law, by-law, rule, regulation or resolution of the Council of Ministers, but such the law, by-law, rule, regulation or resolution of the Council of Ministers induces unfairness or inequality before the law or being the ground of discrimination or out of date, the Ombudsman shall recommend the related government agency, State agency, State enterprise or local government organisation to cause revision or amendment to such law, by-law, rule, regulation or resolution of the Council of Ministers. If the recommendation relates to the resolution of the Council of Ministers, the report shall also be submitted to the Council of Ministers for information.'

## **6.2.2 The Functioning of the Ombudsman**

In law, therefore, the Ombudsman's role is a very broad one, as befits the nature of administrative justice. In this section, the functioning of the traditional roles of the Thai Ombudsman is reviewed according to the framework adopted in Chapter 3 which identifies two key aspects of the Ombudsman work in term of the institution's contribution to administrative justice.<sup>14</sup>

### ***(i) Resolving individual complaints***

In examining the role of the Thai Ombudsman in dealing with individual complaints; this section breaks the process of dispute resolution down into its constituent parts, which are: (a) jurisdiction; (b) accessibility and public awareness; and (c) methods for resolving complaints. By doing so, the section focusses on the key issues that an ombudsman scheme must address if it is to be effective.

In this first section, the capacity for complaints to be made to the office is considered through a discussion of its jurisdiction, its accessibility, and the public's awareness of the office. These three features directly affect an ombudsman's ability to receive complaints and its relationship with the public. They therefore relate closely with the ombudsman's function in resolving complaints. (Other essential features of ombudsman institutions will be explored in Chapter 8.)

### **(a) Jurisdiction**

It has been shown above that, in common with many other ombudsmen, the Thai Ombudsman has a wide mandate. Grounds for the Ombudsman review are stated broadly to include illegality as well as injustice done to a person by all kinds of government officials, whether such act is lawful or not.<sup>15</sup> Ombudsmen are often the only place in government where the fairness of an act can be assessed and recommendations made to remedy decisions or actions that, while strictly legal, may nevertheless be incompatible with broader standards of justice. However, the ability of an ombudsman to assist a complainant is also dependent on its jurisdiction.

By statute, the Thai Ombudsman can investigate all types of public officials. The authorities subjected to the jurisdiction of the Ombudsman include government departments, government bodies, state agencies, state enterprises and local

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<sup>14</sup> Trevor Buck, Richard Kirkham and Brian Thompson, *The Ombudsman Enterprise and Administrative Justice*, Ashgate, Surrey, 2011.

<sup>15</sup> The Organic Act on Ombudsmen, 2552 B.E. (2009), section 13(1) (a), (b), (c).



government organisations and constitutional organisations.<sup>16</sup> This range of bodies that can be investigated covers almost the full breadth of state activity, including police, prisons, health, housing and education, services which in some jurisdictions are excluded from the scope of a general ombudsman. The scale of the Thai Ombudsman's jurisdiction therefore is wider than ombudsman schemes in many jurisdictions.

While it is regarded that the wide jurisdiction of the ombudsman is preferred over a limited jurisdiction, as this means a wider range of government activities can be reviewed, it should be noted that other places have specialised ombudsman bodies focussed at different parts of public sector.<sup>17</sup>

As opposed to the wide jurisdiction approach, the specialised ombudsman model has the benefit of focussed subject matter expertise. A benefit of having a specialised ombudsman is that an office with specific jurisdiction might be better placed to highlight the opportunities for redress and to encourage people to complain. However with regard to Thailand, for the time being this current arrangement arguably seems to suit the purpose of the institution for at least two reasons. Firstly, the Thai Ombudsman is meant to be a body that looks at the general public administration system and fills in the gaps in the existing administrative justice system, which in turn promotes easy access as this wide jurisdiction approach enables the Ombudsman to provide a cost efficient 'one-stop' service. Secondly, given the low level of complaints that the Ombudsman currently receives (see below), it would be uneconomical and inefficient to create new specialised ombudsman bodies. But this also follows that if a particular problem area can be identified where complaints are concentrated in a particular area of government, it might be appropriate to consider introducing a separate specialised ombudsman.

#### *Limits on jurisdiction*

Even where the overall jurisdiction is wide, most ombudsman schemes will place some specific restrictions on the areas that the ombudsman can investigate.

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<sup>16</sup> The Organic Act on Ombudsmen, 2552 B.E. (2009), section 13(1) (a), (b), (c).

<sup>17</sup> For example, specialised ombudsman model is dominant in England. However there is an ongoing debate whether to integrate or to harmonise multiple schemes in the ombudsman community in England. Discussion see Richard Kirkham and Jane Martin, 'The creation of an English Public Services Ombudsman: mapping a way forward,' *democraticaudituk*, 20 June 2014, retrieved 19 September 2014,

<http://eprints.lse.ac.uk/57677/1/democraticaudit.com->

[The\\_creation\\_of\\_an\\_English\\_Public\\_Services\\_Ombudsman\\_mapping\\_a\\_way\\_forward.pdf](http://eprints.lse.ac.uk/57677/1/democraticaudit.com-The_creation_of_an_English_Public_Services_Ombudsman_mapping_a_way_forward.pdf).

Ideally, limitations on the Ombudsman's jurisdiction should be carefully defined, as the ability to help complainants is enhanced by the breadth of their jurisdiction. Limited jurisdiction means leaving large areas of public power free from scrutiny. As a general rule, limitations on the ombudsman's jurisdiction should exist only to prevent jurisdictional problems so that the ombudsman does not unduly disturb the power structure of the state. In common with most ombudsman schemes elsewhere, in Thailand, these jurisdictional limitations apply to all investigations into national security, defense or international relations. In addition, matters relating to government policies, the trial and adjudication of a court, personnel issues of the civil services and disciplinary actions are excluded from the Thai Ombudsman's jurisdiction.<sup>18</sup>

Another common issue that needs to be considered in the design of public service ombudsman schemes is the use of private service delivery agents to deliver government functions. Although the jurisdiction of the Ombudsman of Thailand is limited to public authorities, and does not cover private individuals or companies, the Ombudsman does not feel that outsourcing of service delivery from government departments to private bodies restricts his mandate.<sup>19</sup> Based on the Ombudsman's published documents, the Ombudsman has investigated and resolved complaints against individuals or firms engaged in the delivery of a public service. The Ombudsman considers that he has the authority to consider the actions of public authorities in outsourcing services, or the actions of government bodies that are supposed to enforce rules and regulations and monitor operations and safety standards.<sup>20</sup>

In terms of jurisdiction, therefore, arguably the legislation under which the Ombudsman currently operates is relatively unrestrictive and has been supported by a liberal interpretation of the office's powers in the practice of the Ombudsman in exercising his power, as discussed above. This legal framework could possibly be the most important factor in explaining the low proportion of complaints received by the office that the Ombudsman cannot resolve. The Ombudsman's statistics during the past five years shows that complaints which were considered to be outside its jurisdiction represent 35% of total complaints in each year. This amount can be

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<sup>18</sup> The Organic Act on Ombudsmen, 2552 B.E. (2009), section 28.

<sup>19</sup> Ombudsman Sriracha Charoenpanich, an interview with the author on 3 March 2013, at the Ombudsman Office, Bangkok.

<sup>20</sup> The Thai Ombudsman Office, *Thai Ombudsman at a Glance*, Bangkok, 2009.

considered low given that many other schemes have recorded much higher number of complaints that fall outside their jurisdiction.<sup>21</sup> Indeed, by far the most common ground for the rejection of a complaint by the Thai Ombudsman office was that the complaint lacked the complainant's legally required details, such as names and signatures resulting in insufficient information to process further.<sup>22</sup> Taking this into account, very few complaints to the ombudsman are genuinely outside its jurisdiction.

The wide jurisdiction and the low number of rejected complaints help to enhance the Ombudsman's image as a channel for complaints of administrative grievances of almost all types. This might be considered strength of the office when compared to other schemes that regularly record rejections of a higher number of complaints on the basis that they are outside of jurisdiction.<sup>23</sup> What this might suggest of the Thai Ombudsman scheme is that, for those that do pursue a complaint, the Thai arrangements make it relatively easy for the complainant to identify the appropriate body to whom to submit a complaint.

## **(b) Access and public awareness**

An ombudsman scheme should establish practical and usable routes for complainants in seeking redress. As discussed in Chapter 3, accessibility is one of the essential elements of an ombudsman. An Ombudsman is regarded as a redress mechanism that provides a fast, effective and user-friendly way of protecting the citizen against maladministration as opposed to juridical procedures that are often complicated and expensive. Therefore it must be easily accessed by the public. It was suggested that the degree of accessibility and public awareness can be tested by the following questions.

### ***Access and public awareness***

- *Can anyone bring a complaint directly to the Ombudsman without paying a fee or passing through an intermediary office?*
- *Can a complaint be lodged informally e.g. verbally or via internet?*
- *Is the institution accessible to all citizens?*
- *Are there barriers to accessibility?*

<sup>21</sup> Buck et al., n. 14; and for example about 75% of all complaints to the Danish Ombudsman are rejected by the ombudsman primarily due to the fact that citizens have not exhausted administrative redress see Michael Götze, 'The Danish ombudsman A national watchdog with selected preferences', *Utrecht Law Review*, Vol. 6, Issue 1, January, 2010, retrieved 19 September 2013, <http://www.utrechtlawreview.org/>.

<sup>22</sup> The Ombudsman Annual Reports.

<sup>23</sup> Buck et al., n. 14.

- *How does the citizen find out about the office?*
- *Does the office provide for an easy procedure by which to complain?*
- *What does the law say about accessibility?*
- *To what extent does the Ombudsman use electronic technology to aid the process?*
- *Has the Ombudsman employed all reasonable measures to make the general public aware of its existence and role?*

### ***Access***

Section 23 of the Organic Act on the Ombudsman provides unrestricted access to the Ombudsman, as any person, group of persons or community are entitled to make complaints directly to the Ombudsman without paying a fee. In addition, the complainant need not have a direct legal interest in the subject matter of the complaint. This situation is considerably wider than in many other ombudsman schemes within which access is often restricted only to those individuals that can claim that they have suffered an injustice of some form, and collective complaints are not allowed.<sup>24</sup>

The legislation attempts to eliminate barriers in making complaints. Section 24 allows the Ombudsman to accept complaints that are made in writing, verbally or by other means. Here too, this practice accords with best practice in the ombudsman community.<sup>25</sup> There is no requirement concerning the form of the complaint, but complaints made in writing must have the name, address and signature of the complainant.<sup>26</sup> Nor is it the case with the Thai Ombudsman scheme that only citizens can initiate a complaint. Section 26 of the Organic Act provides that a complaint can be referred from a committee of the House of Representatives. A complaint can also be referred where the Senate conducts an inquiry or consideration on any matter and it is of the opinion that such matter is subject to the powers and duties of the Ombudsmen under this Organic Act. Again, this is an access route to the ombudsman not available in many other schemes.

The Ombudsman also stresses that it is the objective of the office to facilitate access. There is evidence in the practice of the Ombudsman that it has made

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<sup>24</sup> This is the case in the UK.

<sup>25</sup> Buck et al., n. 14.

<sup>26</sup> The Organic Act on Ombudsmen, 2552 B.E. (2009), Section 24.

significant efforts to provide for various routes of complaint that are easily and widely accessible, simple and free of charge. These routes include:<sup>27</sup>

- Complain via the internet at [www.ombudsman.go.th](http://www.ombudsman.go.th);
- The telephone hotline 1676 (toll free call nationwide) or 0 2141 9100 and a call centre and electronic handling systems is in place to assist complainants. Toll free is a preferable choice for complainants to contact Ombudsman. Each month the Ombudsman receives approximately 7,000 contacts by telephone;<sup>28</sup>
- Complain by post. In this case the signature of the complainant, address, phone (or home phone contact) is required;
- Complain via mobile handling unit travelling around the country especially in geographical remote areas to receive people's complaints to provide a stronger presence;
- Complain via members of Parliament and Senators in the area of the constituent. At the request of members of parliament, the Ombudsman has its officials stationed at the National Assembly on the days members of the House are convened;<sup>29</sup>
- Complain through the Ombudsman's network. The Ombudsman has been noted in the ombudsman community for its policy in maintaining a relatively small ombudsman office and emphasising the cultivation of a network of other government and nongovernment organizations to facilitate better public access and timely service.<sup>30</sup> The Ombudsman has collaborated with active non-government organisations, such as the Lawyer Council and other organisations, such as the Department of Legal Aid and Civil Rights Protection, Office of the Attorney General. Often these agencies will have a base in every province throughout the country, and thereby operate de facto as extensions of the ombudsman office in matters of complaint referral. The

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<sup>27</sup> The Thai Ombudsman Facebook, retrieved 15 July 2013,

<https://www.facebook.com/thaiombudsman/info>.

<sup>28</sup> The Ombudsman Annual Reports.

<sup>29</sup> Meeting held twice a week on Wednesday and Thursday for House of Representatives and once a week on Friday for the Senate, Ombudsman Sriracha Charoenpanich, an interview with the author on 3 March 2013, at the Ombudsman Office, Bangkok.

<sup>30</sup> George V Carmona, 'Strengthening the Asian Ombudsman Association and the Ombudsman Institutions of Asia', in Asian Development Bank, *Strengthening the Ombudsman Institutions in Asia*, Asian Development Bank Economics Research Paper Series, Asian Development Bank, Mandaluyong City, 2011, p. 23.

goal is to save the expenses of the poor so that they can file their complaints at their own domiciles.<sup>31</sup>

The accessibility to the Ombudsman, in terms of the legislation and the practical efforts of the Ombudsman, compares favourably with standard ombudsman schemes around the world. Some evidence of problems in practice elsewhere in the world includes the requirement for complaints to be made in writing, which appears to discourage some complainants from complaining,<sup>32</sup> or the Member of Parliament filter measure in the UK, which obstructs direct access to the ombudsman.<sup>33</sup> In many respects, it can be said that the Thai Ombudsman's office facilitates accessibility in a more positive manner than elsewhere in the world.

### ***Public awareness***

In order that an ombudsman office is useful for those who need to use them, it must be well known amongst the public. The 2009 Act does not deal directly with the issue of public awareness. However the Ombudsman has continuously employed various strategies to raise public awareness since inception. Activities to increase awareness include:

- regional visits which the Ombudsman usually conducts twice a year;
- a regular programme on National Assembly radio and occasionally other various on television/radio programs;
- periodic publications, such as the Ombudsman's journal;
- promotional materials advertising the existence of a scheme, such as printing on public utility invoices and train tickets;
- large public campaigns, such as disseminating information about the opportunities for complaints to the Ombudsman by 3,000 village health volunteers and 7,000 village radio broadcasting stations;<sup>34</sup>
- exhibitions with universities, other independent agencies, including the Public Relation Department several times per year.

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<sup>31</sup> Chief Ombudsman Panit Nitithanprapas, 'Daily Complaint Handling towards a Systemic Approach: Thai Ombudsman Experience', speech delivered to the 12<sup>th</sup> Asian Ombudsman Association Conference, 7 December 2011, Japan.

<sup>32</sup> UK ombudsman schemes such as the Parliamentary Ombudsman Health Service Ombudsman, see Buck et al., n. 14, p. 98.

<sup>33</sup> UK Parliamentary Ombudsman; and the Assembly Ombudsman in Northern Ireland, see Buck et al., n. 14, p. 98.

<sup>34</sup> The Thai Ombudsman Office, *Thai Ombudsman at a Glance*, n. 21.

The Ombudsman also creates a network of volunteers of its own, as well as in coordination with other government agencies,<sup>35</sup> to help disseminate information on the Ombudsman and to instruct the public on how to file a complaint to the Ombudsman. The Ombudsman's annual reports are available on the website also in the form of Digital Accessible Information System (DAISy)<sup>36</sup>.

It can be seen that the Ombudsman's strategies and community outreach activities or publicity material are consistent with best practice employed in other ombudsman offices.<sup>37</sup>

The improved public awareness of the Thai Ombudsman is partially reflected in the increased number of complaints that the Office has received since it was first introduced in 1999. The workload of the Office had increased from less than 1,000 cases in 2000 and 2001 to 2,595 in 2003 and has remained steady in the area of 2,000-2,700 complaints per year since then. This low turnover in the early years could largely be attributed to the public's unfamiliarity with the Office when it first opened. But there has been a substantial increase in the number of enquiries received after five years of operation.

This finding correlates closely with the finding of two surveys that have been conducted in recent years. In 2002, in a survey conducted by an academic researcher, the public awareness of the Ombudsman scored at 64%.<sup>38</sup> In 2005, a survey by a public agency indicated that the Ombudsman's public awareness has increased to 71.7%.<sup>39</sup> In this latter survey, the public awareness of the Ombudsman was understandably lower than traditional redress mechanisms, like the Court of Justice (91.6 %), but higher than other comparable independent institutions such as the Auditor General (69.6%) and the Human Rights Commission (65.8%).

The relative lack of awareness of the ombudsman office amongst the public has been a problem in other countries.<sup>40</sup> Although no global study has ever been conducted on the awareness of ombudsman schemes, what data we do have suggests

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<sup>35</sup> For example, an agreement with the Ministry of Public Health in 2008.

<sup>36</sup> DAISY is a complete audio substitute for print material specifically designed for use by people with "print disabilities," including blindness impaired vision, and dyslexia.

<sup>37</sup> Buck et al., n. 14.

<sup>38</sup> Pocham Narumon, *The Ombudsman Complaint Investigation Process*, Master of Law Thesis, Chulalongkorn University, Bangkok, 2002.

<sup>39</sup> Thawilwadee Bureekul, *Survey on public confidence in government institutions and satisfaction with public services during 2003-2010*, King Prajadhipok's Institute, Bangkok, 2010.

<sup>40</sup> Buck et al., n 14, p. 94.

that if the Thai Ombudsman has secured an awareness rating in excess of 70%, this is a very credible achievement.<sup>41</sup>

### ***Public awareness and volume of complaints***

The above assessment raises two points worthy of further explanation. First, there is a contradiction between the impressively high rate of public awareness of the office and its relatively low number of complaints received. Therefore the high public awareness rate should be viewed with caution. Second, is there an ongoing strategy within the Ombudsman office to verify public awareness of the office?

On first analysis, it is difficult to avoid the conclusion that the number of complaints submitted to the Ombudsman Office in Thailand is relatively low, given the size of population of 60 million and when compared to ombudsman schemes elsewhere. To take just two examples: in terms of equivalent size of population, the UK PHSO received 29,000 complaints (either the calendar year 2011 or 2011/12);<sup>42</sup> or in terms of similar mandates and powers (albeit a considerably smaller population size) the Portuguese Ombudsman received a total of 7,753 complaints in 2011.<sup>43</sup>

There appears to be an implicit general consensus among ombudsmen that there is a direct relationship between complaint levels and the level of general social faith in and awareness of a given office.<sup>44</sup> In other words, it is generally accepted that the more complaints the office receives, the more this shows that the public knows about it and has confidence in it. However, it is accepted that the number of complaints alone cannot be specifically identified as a measure of performance, as a significant range of external factors need to be accounted for to arrive at meaningful conclusions on complaint levels. This means that comparisons with other ombudsman schemes need to be treated with caution, as each ombudsman scheme has a very different jurisdiction and operates in a very different context and environment

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<sup>41</sup> Especially when compare with longer established scheme. For example in the UK a 2003 survey rated the level of awareness of three main ombudsman organisations at between 37 and 45 per cent, see Public Awareness Survey 2003, retrieved 12 January 2013, <http://www.lgo.org.uk/about-us/surveys/public-awareness-survey-2003/>; and an awareness of the Commonwealth Ombudsman of Australia was rated at 33 % (CO 2007, 45), cited in Buck et al., n. 14, p. 94.

<sup>42</sup> Richard Kirkham, 'The Gibraltar Public Services Ombudsman, a review for the office of the Gibraltar Public Services Ombudsman', December 2012.

<sup>43</sup> The Portuguese Ombudsman Annual Report 2011.

<sup>44</sup> André Marin and Gareth Jones, 'Measuring Ombudsman Performance: Setting Performance Standards and Indicators', in Asian Development Bank, *Strengthening the ombudsman institution in Asia: Improving accountability in public service delivery through the ombudsman*, Asian Development Bank, Mandaluyong City, 2011, p. 8.



Even at this level of analysis, the issue is complicated by the fact that there is little consensus on what amounts to a measurable assessment of ombudsman performance. For instance, in addition to the formal complaints receives, ombudsman schemes will also handle a considerable number of informal communications. In the case of the Thai Ombudsman, in addition to formal complaints, the Thai Ombudsman receives an average of approximately 7,000 telephone enquires per month, which makes the ombudsman's impact look more significant than if one focuses on complaints alone. These inquiries can be an indicator that the public are aware of the Ombudsman's existence and its role, as at least they showed that people thought of the Ombudsman when they had difficulties in dealing with government.

With regards to external factors, in the Thai context, an important factor that needs to be taken into consideration when judging whether the number of complaints is too low is the wider administrative justice system in Thailand. Thailand has a system of compulsory administrative appeal, which means administrative appeal is a required condition for an action in the Administrative Court. It is likely that complaints that come to the Ombudsman are complaints that are not entitled to appeal or have been rejected by the Administrative Court. In this regards, one possible explanation for the low number of complaints is that the complaints which eventually make their way to the ombudsman represent only a very small proportion of the grievances which courts and authorities have to deal with. An ombudsman typically is not a primary mechanism for administrative remedies but instead an option to facilitate redress. This is also the case in Thailand.

In Thailand, the main mechanism in administrative justice is internal appeal followed by an application to the Administrative Court.<sup>45</sup> This can be seen from the fact that for every administrative order that can be appealed or disputed, the law requires that such an administrative order must contain notification on procedure and timeframe for appeal.<sup>46</sup> Further, in general a person must complete available

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<sup>45</sup> The Administrative Court has reported in 2010 that for the past nine years since establishments it has received an average of 6,000-7,000 case per years, retrieved 20 November 2013, <http://prachatai.com/journal/2010/03/27954>.

<sup>46</sup> The Administrative Procedure Act, 2539 B.E. (1996), Section 40.

administrative procedures before filing an administrative case.<sup>47</sup> There are also complaint-handling units established in all ministries.<sup>48</sup>

In addition, Thailand has multiple other channels for complaints, such as the Department of Legal Aid and Civil Rights Protection, an Office of the Attorney General in every province throughout the country. In order to facilitate an aggrieved citizen in lodging complaints, most recently an additional route for complaints has been established under the Office of the Prime Minister. It takes the form of an integrated government complaint centre operated with four channels, all under same codename 1111. Its role is to accept comments, suggestions and clues to bureaucratic red tape and corruption.<sup>49</sup>

It is difficult to draw strong conclusions about the relative importance of different branches of the administrative justice system in Thailand, as there is currently a lack of centralised data on the numbers of grievances dealt by different departmental routes to redress. The prevailing assumption, however, is that despite their lack of independence, significant numbers of complaints are dealt with by these alternative routes.

Besides, there are other specialized institutions, such as the National Human Right Commissioner and the National Counter Corruption Commission, to deal with complaints in specific areas. This network of grievance handling machinery provides a range of alternative, and possibly on many occasions, preferable options with which to pursue an administrative grievance. Complaints to the Ombudsman should not, therefore, be viewed in isolation. The point here is that to gauge the impact of the Ombudsman cannot depend on statistics alone but must take into consideration other factors.<sup>50</sup> More work would be needed to assess whether the Ombudsman is underutilised or not, but what can be concluded from this preliminary inquiry is that the administrative justice system in Thailand is a complex one. All of this makes it difficult to assess the low level of complaints of the Thai Ombudsman.

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<sup>47</sup> The Act on Establishment of Administrative Courts and Administrative Court Procedure 2542 B.E. (1999), Section 42.

<sup>48</sup> For example, Ministry of Interior has established 'Justice Maintenance Centre' in both the Ministry of Interior and most provinces to receive complaints since 1995.

<sup>49</sup> Those channels include an official website [www.1111.go.th](http://www.1111.go.th), a telephone hotline 1111, P.O. Box 1111 and the Counter Service 1111, where people are able to pop in to hand their complaints. The Complaint Center is located at the Prime Minister's Office with a staff of 120 people on rotations to take telephone calls 24 hours a day every day, retrieved 23 December 2013, <http://www.thaigov.go.th/th/governmental/item/4589-.html?tmpl=component&print>.

<sup>50</sup> Buck et al., n. 14.

However, assuming that there is a contradiction between the impressively high rate of public awareness of the office and its relatively low number of complaints received, as indicated above, a question arises as to the reliability of the survey which deserves further explanation. Ideally the reliability of the survey or the representativeness of the survey subjects could be tested through conducting an extended number of surveys, managed independently of the Ombudsman. In this respect, the two pieces of research mentioned earlier could be considered reliable, as both of them were conducted independently of the Ombudsman. Moreover, one of them was conducted by King Prajadhipok's Institute, a major credible institute for political study. Further, both pieces of research reported similar findings despite being conducted separately at different points in time.

After having discussed some aspects of the Ombudsman with relevance to the effectiveness of its processes for receiving complaints, the study now moves on to examine the methods which the Ombudsman employs in performing its complaint resolution function.

### **(c) Methods for resolving complaints**

The ombudsman has been described in chapter 3 as an extension and supplementary office to the pre-existing mechanisms of remedial justice available for individuals to use against the administration in the resolution of their complaints. In performing this function the ombudsman has considerable discretion to decide how far and in what way each complaint should be investigated and resolved. It has also been identified that the ombudsman has developed further methods, apart from formal investigation, in order to enhance their capacity in providing complainants with easier access to justice.

Similarly in Thailand, it will be seen that the techniques the Ombudsman uses are in common with the ombudsman trends. Apart from investigation, the range of primary methods used for resolving complaints includes referral back to the primary decision-maker, mediation and informal settlements via telephone calls. In short, the Ombudsman offers an alternative dispute resolution service. Each mode will be detailed in turn below in order to demonstrate the practice of the Ombudsman as a channel for redress of grievances.

### ***Referral***

As is common with most ombudsman schemes, a complaint presented for the Ombudsman's investigation must first of all be examined to ensure that it is within its jurisdiction. In conforming to the enabling Act of the Ombudsman with regard to the rejection of complaints,<sup>51</sup> complaints that fall outside the jurisdiction or which are rejected because the Ombudsman uses his discretionary power not to accept, are referred back to the relevant concerned agencies to follow appropriate proceedings there. The complainant is notified in writing of the result, stating the ground for rejecting the complaint and where possible redirecting the complainant to the appropriate authority.<sup>52</sup>

At this stage, the Ombudsman offers a service that goes slightly further than simply referring the complainant to another body. The Ombudsman's statistical records show that in many cases the agency being complained against or the superior has not been aware of the incident. In such cases, the official in charge of the complaint will call the complained agency to inquire of the relevant facts and explore possible solutions without investigation. The principle underlying this approach is that, as a general practice, in terms of effectiveness the public body involved should be the first route to address the complainant.<sup>53</sup> First, the concerned public body can consider appropriateness apart from the facts and the law and, secondly, if the disputed matter involves technical expertise, the concerned public body will be in a stronger position to resolve the problems according to the expertise required.<sup>54</sup> This approach of pushing complaints back down the administrative justice system wherever possible chimes with that adopted by most ombudsman schemes around the world.<sup>55</sup> The benefit claimed is that such local redress is capable of securing justice without lengthy procedure.

Speed in handling complaints is an important issue for ombudsman schemes. In the Thai office, procedural arrangements prescribe that upon receipt of a complaint, the complainant must be notified of receipt within 15 days from the date the complaint is received. The Ombudsman therefore serves as an access point that can assist a complainant in identifying the appropriate means by which a complaint is

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<sup>51</sup> The Administrative Procedure Act 2539 B.E. (1996), Section 30.

<sup>52</sup> The Ombudsman Annual Report 2552 B.E. (2009).

<sup>53</sup> Chaiwat Wongwattansarn, *General Law on Administrative Procedure*, Chiraraj Press, Bangkok, 2007, pp. 368-9.

<sup>54</sup> *ibid.*

<sup>55</sup> Buck et al., n. 14, p.190.

best pursued. Records show that for the past five years there were approximately 600 complaints that the Ombudsman has resolved by way of referral each year,<sup>56</sup> representing almost 25% of its turnover.

It can be seen from the above that sometimes citizens do not always know exactly where to pursue grievances against public administration and the ombudsman is providing a conduit service for the redirection of complaints. A good administrative justice system therefore, should provide an independent body that can assist citizens in finding out the appropriate means available to them.<sup>57</sup> What the Thai Ombudsman is doing here is helping people access the administrative justice system – even if the matters cannot be resolved directly by the Ombudsman.

This is not a role which is detailed as such in the Thai Ombudsman legislation, as with its investigative and reporting powers, but its value is not to be underrated. While there are benefits of having in place a range of mechanisms for redress in the administrative justice system, still grievances may go unresolved due to citizens not knowing where to turn to when things go wrong because complainants may find the system too complicated. It is argued here that the Ombudsman plays a distinctive role in enhancing the complainants' ability in entering into the administrative justice system and provides a route to appropriate resolution of their grievances.

After a complaint is accepted, settlements of grievances can be secured by informal telephone settlement, in-depth investigation and analysis and mediation.<sup>58</sup> Each is now discussed in turn.

### ***Settlement through telephone calls and explanation***

The Ombudsman takes the view that wherever possible people's problems should be resolved and relieved promptly. Thus the office emphasises that where a resolution can be reached that is acceptable to the complainant and the alleged authority, an informal settlement should be the chosen method of resolution rather than a formal inquiry which would only prolong the redress process and which may

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<sup>56</sup> Wasan Thepmanee, Public Relations Officer, the Office of the Ombudsman. This unpublished information provided in an interview with the author on 8 June 2012, the Office of the Ombudsman, Bangkok.

<sup>57</sup> Buck et al., n. 14.

<sup>58</sup> The Thai Ombudsman Office, *Twelve Years*, Bangkok, 2005, p. 23.

be entirely unnecessary.<sup>59</sup> This approach mirrors the standard approach adopted by many contemporary ombudsman schemes now.<sup>60</sup>

Within the organisation of the Thai Ombudsman office, Call Centre staffs assist inquirers in terms of availability of data, primary advice, investigating process, internal follow up etc. Informal coordination of a resolution is often organised through direct telephone conversation, instead of relying on traditional bureaucratic analysis of documentation and processes. Fact-finding by telephone is also in line with the Council of Minister-endorsed coordination scheme that requires public agencies to extend their cooperation for internal coordination by telephone to redress a complainant's trouble.<sup>61</sup>

Based on the Ombudsman's experience, on many occasions it is the complainants' own misunderstanding of the reasons for the decision that is the core of the grievance. Therefore, a common role for the ombudsman is to communicate to the complainant the explanation from the complained agency and the matters is settled. In fact a large portion (at the average of about 44%) of complaints received each year during the past five years (2006-2012) have been categorized as containing no breach of law, or no illegal act or unfairness is found.<sup>62</sup> In such cases the Ombudsman normally orders ceasing consideration of a complaint and provides the detailed reasons for the complainant as to why such an act is lawful and fair. Arguably, in neither circumstance would it be appropriate to require a full investigation and formal report to be produced. The complainant can argue with the Ombudsman's conclusion if he is not satisfied with the outcome and according to the Office's internal procedure, the Ombudsman will reconsider if there are new material evidence or facts.<sup>63</sup>

In doing so, the Ombudsman aspires to create a better understanding between the complainant and the concerned government agency. This is a practice common to most ombudsmen.

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<sup>59</sup> The Thai Ombudsman Office, Pichet Soontornpipit, retrieved 3 October 2013, [http://www.ombudsman.go.th/10/10th/pichet\\_talk.pdf](http://www.ombudsman.go.th/10/10th/pichet_talk.pdf).

<sup>60</sup> Buck et al., n. 14.

<sup>61</sup> Office of the Ombudsman of Thailand, n. 20; and Council of Minister Resolution dated 23 April 2003; The Minister to the Prime Minister's Office Thipawadee Meksawan reported that the Government attaches much importance to good governance in the administrative sector. It promotes public participation by providing people with channels in which they can easily inform the government of their suggestions and complaints. The principle behind this policy is that all state agencies that receive complaints should aim to be fast, convenient and easy to access.

<sup>62</sup> The Ombudsman Annual Reports 2549 – 2555 B.E. (2006-2012).

<sup>63</sup> The Ombudsman Annual Report 2551 B.E. (2008).

### ***Alternative dispute resolution***

The incumbents of the Thai Ombudsman office have continuously placed great emphasis on its role as a facilitator, negotiator and coordinator between those people lodging complaints and the agencies or officials that the complaints are lodged against. The Thai Ombudsman can perform well in redressing administrative grievances, especially where a grievance may not be capable of resolution in the court using methods of negotiation. It is also evident that the Ombudsman's intervention by mediation has helped alleviate power imbalances between authorities and aggrieved citizens. Mediation can secure redress that complainants agree to which is likely to bring a satisfactory outcome to their grievance.

Pramote Chotemongkol, a former Ombudsman, shaped the profile of the institution as a mediator with his approach to collaboration with concerned public agencies for resolution. He was of the opinion that the major function of the Ombudsman is to provide redress for individual grievances and it was important to give local authorities every possible chance to remedy or answer a complaint. In this respect alternative dispute resolution (ADR) was a highly effective tool. In addition, through ADR, the complainant can obtain a remedy more quickly, the authority is spared from the publicity that an investigation creates, and the Ombudsman's office is saved the necessity of conducting a time consuming investigation which might take upwards of six months to one year. He indicated that, for settlements resolved by techniques other than a formal investigation, the average time taken from the receipt of a complaint to the achievement of a settlement has been in the range of one month for an easy case to six months for a difficult case, which compares very favourably with the time taken for an investigation to be completed from the lodging of a complaint.<sup>64</sup> General Theeradej Meepien, another former Ombudsman, has stated that he thought that mediation works well in Thai society because Thai people in general do not like conflict and are easy to forget and forgive by nature.<sup>65</sup>

ADR is implemented through a process of meetings and site visits, with in many cases disputes successfully settled peacefully through official agreement. The Thai Ombudsman usually employs a variety of ADR techniques to secure redress for injustice in those cases where the complainants have suffered, but do not have the

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<sup>64</sup> Pramote Chotemongkol, 'The Ombudsman, the toothless tiger', *The Manager*, 7 July 2006, retrieved 3 October 2013, <http://www.manager.co.th/iBizchannel/ViewNews.aspx?NewsID=9490000087016>.

<sup>65</sup> *The Ombudsman Journal*, 3<sup>rd</sup> year, Vol. 1, January-June 2010, Bangkok, p. 110.

legal rights to obtain redress that can be enforceable by the Court of Justice or the Administrative Court. Unfortunately, the reports of the Ombudsman do not show the full statistical classification of the cases resolved by the different techniques employed by the ombudsman. However, examples have been provided of this technique in action. They include a case where a complainant was barred by prescription from bringing an action to the Administrative Court,<sup>66</sup> or a case where the discretion is lawful but might result in unfairness, such as discretion that results in unnecessarily overburdening the complainant. In such cases the Ombudsman normally recommends a review of the decision.

A good example of the Ombudsman's use of ADR techniques to review administrative decisions when there is no other means of remedies available involved the Ministry of Agriculture and Cooperatives. With this complaint, Ombudsman suggested to the Ministry of Agriculture and Cooperatives that it liaise with relevant agencies to consider granting more compensation to the complainant, and this initiative eventually resulted in the Council of Minister's resolution of 30 January and 20 February 2007.<sup>67</sup> Another example involves a complaint involving the Metropolitan Electricity Authority of Thailand (MEA) which installed a transformer pole opposite the residence of the complainant. The Ombudsman successfully coordinated with the MEA to reconsider moving the pole to a safer position.<sup>68</sup>

The above discussion demonstrates that the Ombudsman can be effective in facilitating dispute resolution between complainants and state authorities. The Thai Ombudsman's current practice is consistent with an early settlement technique increasingly adopted by many ombudsmen to resolve complaints informally without resorting to full investigations.<sup>69</sup> The justification for this approach is universally claimed to be that early settlement is likely to be appropriate for dispute resolution, primarily because it is less costly and time-consuming. Early redress is also arguably more conducive to maintaining a good relationship between complainants and public bodies and delivers a more comfortable experience for the complainant.

Nevertheless, settlement without investigation has a negative side. Critics have alleged that the process is unfair and there is often a fear that it might involve a

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<sup>66</sup> The Thai Ombudsman Office, *Thai Ombudsman at a Glance*, n. 21.

<sup>67</sup> The Ombudsman Annual Report 2551 B.E. (2008).

<sup>68</sup> The Ombudsman Office, *An introduction to the Parliamentary Ombudsman*, the Ombudsman Office, Bangkok, 2006, p. 124-127.

<sup>69</sup> Marin and Jones, n. 44.



negotiated conclusion between the ombudsman and the agency.<sup>70</sup> Questions which follow may include, for example, is the concerned department trying to hide something which it does not want investigated? Or should settlements be encouraged if the evidence suggests that there could be some serious administrative defects? One solution practiced by other ombudsman schemes is that the ombudsman issues a statement of reasons for such decisions, so at least makes public aware of the underlying nature of the complaint.<sup>71</sup> The Thai Ombudsman does not employ this practice.

Another important issue needs to be pointed out is that the aim of an ombudsman is not simply to ensure that an individual gets a remedy for a grievance; he must also try to discover the administrative irregularities and ensure that they will not recur. In this respect, all ombudsman schemes are required to strike a balance in their approach to their works. This is reflected in the response of observers of the institution towards the Thai Ombudsman's work, which has not been entirely positive. The Ombudsman's focus during the initial stage on the role as a mediator has been criticised by scholars and legislators as severely affecting the Ombudsman's constitutional mandate of monitoring the exercise of power by public officials. The argument has been made that the strategy of encouraging negotiated redress has resulted in insignificant achievements in preventing grievances to the people, despite the numerous laws passed to support the Ombudsman's powers.<sup>72</sup> A senior administrator has even stated that the Ombudsman's role as a mediator was not commensurate with its constitutional status, and that the Ombudsman should monitor more vigorously on administrative malpractice.<sup>73</sup>

The data of the Thai Ombudsman does not show the proportion of cases resolved through mediation or indicate the nature of subject matters that were resolved by this approach. In the absence of information, it is therefore difficult to tell whether settlements without investigation have become more frequent or the number of investigations has been falling, or in other words whether the investigator role has been lost or compromised.

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<sup>70</sup> Buck et al., n. 14.

<sup>71</sup> id., Chapter 4.

<sup>72</sup> Promradyod, n. 12.

<sup>73</sup> Deputy Permanent Secretary to the Prime Minister Office Kamon Suksomboon, an interview with the author on 29 March 2013, at the Government House, Bangkok.

In response to the criticism above, Chief Ombudsman Panit has explicitly stated in her public statements many times that she would still be doing early redress the Office, but that more emphasis is now being placed on systemic investigation (see ‘(ii) *recommendation to improve administration*’ below).

Inevitably though, not all complaints can be handled through the informal process. Complaints may be more complicated for a number of reasons. They may concern a lot of documents, several parties may be involved and many related pieces of legislation may require consideration and have to be complied with by the complained against agency. In such circumstances, the complainant will be advised to proceed with a written complaint. In such cases the Ombudsman requires the agency’s written statement for reference in making investigation. Again, all of this is in line with standard practice elsewhere in the ombudsman world.<sup>74</sup>

### ***Investigation***

The Ombudsman strives for speedy and thorough fact finding. A target has been set for internal working procedures that all complaints coming into the office must be finished from start to end within 6 months. To achieve this goal the Ombudsman has developed admirably specific targets for expediting and investigation and resolution of complaints as follows.<sup>75</sup>

Complaints are screened to determine jurisdiction.	1 day
The Secretariat or Deputy Secretariat then assigns the case to relevant director of investigations or specialist.	1 day
Director of investigations or specialist assigns case to responsible officer.	1 day
The responsible officer undertakes a secondary screening process.	1 day
The responsible officer completes the investigation plan (if required).	14 days
The responsible officer request the government agency involved for its account which is to be provided within	30 days
Upon receipt of the government agency’s account, the responsible officer completes a summary report within	15 days

According to the Ombudsman Office’s working procedure, in the event that the government agency does not respond within 30 days, the measures taken are (i) the issue of a warning; and (ii) to report such delay levels of the bureaucracy to the relevant Permanent Secretary and to the Minister in charge respectively.<sup>76</sup> Each of these levels of the bureaucracy is given 15 days to respond before the Ombudsman

<sup>74</sup> Rajani Ranjan Jha, ‘*Concept and Role of the Ombudsman Institution in Asia in Improving and Maintaining Public Service Delivery*’, Asian Ombudsman Association, 2010, p. 41.

<sup>75</sup> The Thai Ombudsman Procedure Manual.

<sup>76</sup> *ibid.*

notifies the next level. The six-month target for completing investigations is line with the standard practice of ombudsmen, though increasingly more ombudsmen have set a target time for disposing of complaints within less than six months.<sup>77</sup>

To support the Ombudsman's operation, the Council of Ministers passed a resolution<sup>78</sup> that all government bodies shall accelerate their own explanation when receiving the request from the Ombudsman Office. In addition, in 2005 the Ombudsman made an agreement with the Office of the Civil Service Commission that cooperation with the Ombudsman should be acknowledged in a concrete manner: by giving credit to the concerned agencies, especially in terms of bonuses allocated for such agencies.<sup>79</sup>

The Ombudsman has mentioned in several of its annual reports that in general the Office receives good collaboration from the affected agency in submitting documents or evidence as requested, despite clarification and explanation from the concerned government agencies being cited as one of the main reasons for delays in closing an investigation. However, to date the Ombudsman has not had to apply legal enforcement measures against the agencies to obtain necessary evidence.<sup>80</sup>

According to Chief Ombudsman Panit Nitithanprapas, the Ombudsman Office has set a target in the internal working procedure that all complaints must be finished within six months.<sup>81</sup> She proudly reported that the Office has a small backlog, stating that since the Office was first opened it has been able to finish 23,807 cases, which represent 94.6% of total 25,171 complaints received, while only 1,366 cases or 5.4% of total complaints are still under investigation.<sup>82</sup>

This can be an elusive conclusion if the Chief Ombudsman perceived this as a small backlog. In fact, this amount of pending complaints accounted for about half of the total amount received each year. The numbers of unresolved complaints in 2010, 2011, 2012 and 2013 were reported to be 1,895; 1,123; 1,365 and 1,317 respectively.<sup>83</sup> As reported in 2013, the cases which were completed within six

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<sup>77</sup> For example Hong Kong Ombudsman and Pakistan Ombudsman, see Marin and Jones, n. 44.

<sup>78</sup> Ministerial Resolution dated 27 April 2004.

<sup>79</sup> The Ombudsman Annual Report 2547 B.E. (2004).

<sup>80</sup> Ombudsman Sriracha Charoenpanich, an interview with the author on 3 March 2013, at the Ombudsman Office, Bangkok.

<sup>81</sup> Chief Ombudsman Panit Nitithanprapas, 'Daily Complaint Handling Toward a Systemic Approach', n. 31.

<sup>82</sup> *ibid.*

<sup>83</sup> The Ombudsman's Annual Reports 2553, 2554, 2555 and 2556 B.E. (2010, 2011, 2012 and 2013).

months accounted for only 53.12% of total processing cases in that year.<sup>84</sup> This appears to suggest that the Ombudsman Office has not effectively met its own target.

Nevertheless the Ombudsman has received a relatively high level of satisfaction rating on its services. According to a satisfaction survey on its services conducted by the Ombudsman Office in November 2012, the Ombudsman received a high score on overall services, complaint procedures and investigation (74.80 %, 77.40 % and 72 % respectively) and medium level of satisfaction on actions after consideration of complaints (59%). This could be perceived as a good outcome, but this satisfaction survey would be more credible if undertaken independently.

### ***Tripartite meetings***

During an investigation, the Ombudsman gives both affected officials and complainants the opportunity to provide additional information and explanation, as well as to request more evidence. However, the inquisitorial method employed by the ombudsman can sometimes produce one-way communication or unilateral explanations. This in turn can lead sometimes to complainants expressing scepticism about the Ombudsman's decision, with former complainants even comparing the Ombudsman with a postman in terms of his duty.<sup>85</sup> It is argued here that this point of view of the complainant experienced by the Thai Ombudsman reflects a common form of frustration that complainants can experience with ombudsman schemes. This frustration derives from the fact that complainants usually have no active part in the investigatory process of the ombudsman which normally does not require continued input from the complainant.<sup>86</sup>

To tackle such situations, the Ombudsman has the option of forming a tripartite meeting in which the complainant, the Ombudsman and the particular government agency concerned can participate to settle the issue through a mediated settlement. This approach gives the complainant a sense of participation in solving their problems. Tripartite meetings can be held in Bangkok or other provinces that suits parties' needs. This arrangement is facilitated by the Ombudsman's regular seminars (at least quarterly) and visits to special areas (such as areas of high density of complaints). Such visits are arranged in an attempt to meet people in several

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<sup>84</sup> The Ombudsman's Annual Report 2556 B.E. (2013).

<sup>85</sup> Ombudsman Sriracha Charoenpanich, an interview with the author on 3 March 2013, at the Ombudsman Office, Bangkok.

<sup>86</sup> Buck et al., n. 14, p. 104.

provinces, wherein the Ombudsman and officials are available to give advice and find ways to relieve troubles of people throughout the countries.<sup>87</sup>

The Ombudsman has stated many times in the Office's publication and website that a number of complaints are settled peacefully through tripartite meetings.<sup>88</sup> Nevertheless the Ombudsman's statistical records do not show the number of cases resolved by this method, and the extent of its use is difficult to ascertain.

### ***Investigations outside the office***

Some complaints require the ombudsman to conduct investigations outside the office, particularly those that deal with construction, land or environment. With such investigations, site visits are conducted by the Ombudsman or the investigators whenever deemed necessary in order to observe, investigate facts in the actual area and listen to both the complainants and the agencies involved. Such physical investigations aim for fast fact finding and also to promote better understanding, so that disputes are solved fairly and the complainants do not feel neglected by the Ombudsman or the government agencies.<sup>89</sup> Besides, employing an investigation outside the office can be a good way to raise social awareness of the Ombudsman's existence through public exposure.

The above subsection shows that the Thai Ombudsman can help resolve grievances in a number of different ways, such as providing access to justice for members of public who have difficulties with public administration through a simple and non-onerous channel for grievances and complaints and resolving complaints which may not be justified in court. The Ombudsman's technique and capabilities in extending administrative justice are in line with standard ombudsman schemes as discussed in chapter 3. The next section will examine the function of the Ombudsman in systemic investigations to see if changes are made in administrative procedures or legislation as the result of such investigations.

### ***(ii) Recommendations to improve administration***

In the past, the main duties of the Ombudsman focussed only on fact finding concerning the complaints on maladministration, which indicated investigation of

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<sup>87</sup> The Thai Ombudsman Office, *Thai Ombudsman at a Glance*, n. 21.

<sup>88</sup> The Thai Ombudsman Office, *Twelve Years*, n. 58.

<sup>89</sup> The Thai Ombudsman Office, *Thai Ombudsman at a Glance*, n. 21.

unlawful activity. But the new Organic Act on Ombudsman has provisions that go clearly and significantly beyond individual grievance redress, by making explicit reference to the notion that the Ombudsman may recommend systemic changes. The Ombudsman, therefore, is expected to address the root causes of maladministration, as well as resolve grievances.

Firstly, section 32 empowers the Ombudsman to check the appropriateness of existing legislation by recommending amendments to legislation in cases where the Ombudsman is of the opinion that, despite an act of a government official being compliant with the law, by-law, rule, regulation or resolution of the Council of Ministers, that that provision induces ‘unfairness or inequality before the law or being the ground of discrimination or out of date’. This expanded power allows the Ombudsman to deal with cases where there is no maladministration on the part of the administration but there is injustice as a result of the authority’s action. This is a power which is quite common to ombudsman schemes around the world and is designed to increase the potential impact of the office.<sup>90</sup>

Secondly, Section 13 empowers the Ombudsman to protect the public interest by conducting own-motion investigations which permit the Ombudsman to start an investigation without being bound by the requirement to resolve particular complaints. Such own-motion investigations can be launched if the Ombudsman is of the opinion that the exercise of public powers causes injuries to the public or it is necessary to protect public interests.

In order to place an emphasis on the systemic solution, the Thai Ombudsman has set up a Research and Strategy Division to examine the causes underlying complaints and to undertake research of similar cases from other ombudsman’s experiences around the world.<sup>91</sup> Results and knowledge gained during investigations are taken into consideration in analysing case information on the issues, alongside the relevant applicable law. This information is then used by investigators in determining the probable causes of complaints and to propose suggestions for administrative changes to reduce or prevent similar complaints occurring.

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<sup>90</sup> A major exception to this is British public services ombudsman schemes.

<sup>91</sup> A training seminar for ombudsman investigators was organized by AOA in collaboration with the Ombudsman of Ontario to promote effective performance of their systemic investigations functions, *Sharpening Your Teeth: Advanced Investigative Training for Administrative Watchdogs*, 8–11 February 2010, Bangkok.

This development in Thailand has benefited from the growing attention being given to this by ombudsmen in other countries, especially in AOA members. In response to this, AOA in collaboration with the Ombudsman of Ontario organised regular training seminars for ombudsman investigators to promote effective performance of their systemic investigations functions. For example, a seminar on *Sharpening Your Teeth: Advanced Investigative Training for Administrative Watchdogs* was held in Bangkok, in 2010 and the next one is scheduled to be held in 2014. Participation in such initiatives demonstrates that the Thai Ombudsman takes the duties to promote good administration very seriously.

In practice, to date activities of the Ombudsman which aim for systemic changes can be categorised into three main areas: producing special reports, improving administrative procedures and proposing law reform. These will be looked at in turn.

### ***Special reports***

In many ombudsman schemes the special report refers to a report that the ombudsman submitted to parliament in the event of non-compliance with the recommendations that the ombudsman makes, but in Thailand the Thai Ombudsman uses the term to refer to the reports resulting from own-motion investigations on matters that he deems ‘urgent or beneficial to the administration of State's affairs’.<sup>92</sup>

The Ombudsman of Thailand claimed its special report in 2007 on polluted water in Nakhon Pathom Province as its first systemic investigation. This first case involved grievances which arose from environmental problems in Nakhon Pathom Province.<sup>93</sup> Complaints were made against *Tambon* (a sub-district administrative organization) which had allegedly failed to ensure compliance with regards to the discharge of wastewater from pig farms and industrial plants. As a result, natural water resources were contaminated and could not be used for agriculture. The Ombudsman’s investigation found that the input of various government agencies was required to solve the problems.<sup>94</sup> The Ombudsman instructed the concerned agencies

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<sup>92</sup> The Organic Act on Ombudsmen, 2552 B.E. (2009), Section 43. The Ombudsmen may, if it deems appropriate, make a report on any specific matter to the Council of Ministers, the House of Representatives or the Senate for information if it deems that such matter is urgent or beneficial to the administration of State's affairs.

<sup>93</sup> The Thai Ombudsman Office, *Thai Ombudsman at a Glance*, n. 21.

<sup>94</sup> Public agencies involved were the Nakhon Pathom Province, the Ministry of Interior, the Ministry of Agriculture and Cooperatives, the Ministry of Natural Resources and Environment, the Ministry of

to perform their duties and strictly enforce the rules and regulations for industry expansion and pollution control and established cooperation between such agencies.

This case is considered by the Ombudsman as its first systemic investigation report, as the investigation involved a large number of complaints and several phases. In terms of the agencies that were covered by the report, there were ministries, departments, relevant governmental agencies, NGOs, and civil society. In terms of the geographical area covered, there were several provinces which were required to apply the Ombudsman's suggestions. The report also encompassed a significant investigation of waste water treatment techniques. The Ombudsman identified that the lack of inter-departmental coordination and related problems of compartmental mentality were the cause of complaints.

By comparison with the early work of the Ombudsman, recently the office has been more active in its efforts to produce special reports and has increasingly been prepared to consider matters of policy, as well as administration. In 2012 alone, the Ombudsman published four special reports which the present Chief Ombudsman Panit referred to as 'grand themes', due to the fact that they encompass a range of public policies at a national level. These reports involved the following issues: 'Illegal Foreign Ownership of Land', 'Traffic Jam Management in Bangkok', 'National Spatial Development Plan' and 'Free Education Policy'. The Ombudsman considered these issues critical to current national problems and believes they require urgent rectification. The reports are published in the form of monographs which the Ombudsman has submitted to parliament and disseminated to the public. In 'Free Education Policy' the Ombudsman took a view that the nation's educational services have been diminishing in terms of quality over the past ten years because the Education Ministry has focused on free education for all, warning that the Education Ministry must review the 15 years of free education policy before it fails children and brings the national education into crisis.

These most recent reports suggest a bold initiative on the part of the Ombudsman, but at the time of writing there is no evidence that these four special reports have been either partially or wholly implemented.<sup>95</sup> While they attracted media attention, there is no evidence to show that Parliament has responded nor even

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Industry, the Ministry of Energy, the Ministry Tourism and Sports, the Provincial Administrative Organization and the Local (*Tambon*) Administration and the Municipality, etc.

<sup>95</sup> The Ombudsman's Special Report on the Solution of Waste Water Crisis in Nakorn Pathom Province, 2007, in The Thai Ombudsman Office, *Thai Ombudsman at a Glance*, n. 21.



made comments on the reports, or that the Ombudsman has been summoned to present the reports.<sup>96</sup>

Further, one of the 2012 reports, 'Illegal Foreign Ownership of Land', is illustrative of some of the challenges that an ombudsman can be faced with, in terms of exercising influence over Government and the legislature. The report has been controversial, as the responsible agency has outright denied the accuracy of the Ombudsman's statistical findings and stated that it was prepared to cooperate if the government, Parliament or the Ombudsman needs further information.<sup>97</sup> In defence, Ombudsman Pravit Ratanapian has admitted that it is difficult to provide evidence of illegal ownership. Currently the Ombudsman is seeking support for a legislative proposal to prevent foreigners illegally owning land via nominees and provide harsh sanctions, such as five to 20 years in prison and/or a fine of 500,000 to 2 million baht.

To issue a report which is not likely to be implemented hardly has a positive effect on the public perception of the office. Therefore, it is worth looking at the various observations that have been made about the Ombudsman's efforts to achieve systemic impact by special report. Both scholars and administrators have opined that the special reports of the Ombudsman that have so far been produced are not easy to implement.<sup>98</sup> First, they are too broad and have not proposed ready measures for rectifying the defect in the existing system. For example, it is difficult to implement the 'Illegal Foreign Ownership of Land' report as proposed, as there is an unsettled issue of statistical evidence due to difficulties in proving illegal ownership. This has as yet not been resolved and should be resolved first otherwise the punishment, as proposed by the Ombudsman, would be of no use. Secondly, and more importantly, the issue of how to subsidise education and land use zoning are matters of policy

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<sup>96</sup> Based on Minutes of the Parliament, retrieved on 4 February 2013, [http://librarymb.parliament.go.th/snacm/minute\\_advance\\_search.jsp](http://librarymb.parliament.go.th/snacm/minute_advance_search.jsp); and the Ombudsman Annual Reports; Chief Ombudsman Panit Nitithanprapas, an interview with the author on 15 March 2013 at the Ombudsman Office, Bangkok; and Ombudsman Sriracha Charoenpanich, an interview with the author on 3 March 2013, at the Ombudsman Office, Bangkok.

<sup>97</sup> Thai law restricts foreign ownership of land. The Ombudsman's finding is based on an academic research which claims that a third of the land is illegally owned by foreigners who circumvent the law. Apparently the findings that the Ombudsman used to formulate his recommendation has not referred to the data of the concerned agency that is directly in charge of the issue which being investigated by the Ombudsman. In response to the Ombudsman's report, Director General of the Law Department said that the ownership of land is under the department's direct responsibility and it possessed the information. He expressed doubt on where the evidence came from and how the ombudsman came to such amount which seemed to be too high. See more details in, 'Losing Territory – One Million Rai', *Thairath*, 16 March 2012, retrieved on 4 February 2013.

<sup>98</sup> State Councillor Professor Soonton Maneesawat, an interview with the author on 12 March 2013, Bangkok.

which would require political debate and decision as the implementation will be dependent on political support. Therefore, this raises a question of whether special reports of the Ombudsman could be considered as having systemic impact, as they are more in the sphere of making policy-based recommendations than practical administrative proposals and guidance.

So a generic difficulty the Ombudsman is faced with is that, in choosing to target policy weaknesses of the government, it risks reducing the office's potential for concrete short-term impact. An additional risk is that by producing a series of special reports that appear to focus on the formulation of new policy might be perceived as an inappropriate role for an ombudsman. Further, such reports tend to be followed by press conferences and frequent media interviews by the Ombudsman, in which he has regularly criticised government policies. Such an approach can make the Ombudsman appear, in the eyes of the government, to be a major critic against the government, or in the worst case an opponent of the government. As the Ombudsman would have to depend on the government to implement his reports, this situation is not in his favour and also contradicts standard perceptions of the role of the Ombudsman. Traditionally, an ombudsman is understood as needing to cultivate a strong working relationship with government departments, so that they will be less resistant to working with the office toward possible solutions and will be more receptive to their recommendations.

### ***Recommendations to improve administrative procedure***

The current Chief Ombudsman's strategy can be found in the paper 'Identifying People's Concern from the Daily Flow of Complaints and Contribute to Systemic Improvements'.<sup>99</sup> The Ombudsman has tried to make the most of its interventions in resolving individual grievances so as to bring about what it calls 'wider administrative improvement.'<sup>100</sup> While the power to make recommendations has been used largely in connection with his inquiries into actual cases, it can also contribute to the tendency of the Ombudsman to emphasise the general problems raised by a case and the future consequences of his decision, rather than on the specific fault which was the subject matter of the complaint.

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<sup>99</sup> Chief Ombudsman Panit Nitithanprapas, 'Daily Complaint Handling Toward a Systemic Approach,' n. 31.

<sup>100</sup> Chief Ombudsman Panit Nitithanprapas, an interview with the author on 15 March 2013 at the Thai Ombudsman Office, Bangkok.

The first case claimed by the Ombudsman as successful in improving administrative procedure is the resolution of the encroaching of a national park in Nakornratchasima province. In this case, the Ombudsman found out that the alleged illegal intrusion of the national park by nearby villagers resulted from a confusion caused by different maps being used by different concerned government agencies. The Ombudsman's report (known as the Wangnamkheo Model) makes administrative recommendations for the long term resolution of the issue, a proposal which can be applied to similar problems facing other national parks throughout the country.<sup>101</sup>

Another investigation by the Ombudsman that not only resulted in the provision of relief to the complainant, but also improved the system concerning the correction officer's exercise of power, can be illustrated by the following case. In the case, a motorcyclist filed a complaint to the Ombudsman in which the police had fined and confiscated his driving license due to the loss of a license plate. This police response occurred, despite the motorcyclist explaining that he had already filed for a new license plate and had gone through the proper process and that he possessed the appropriate documents to prove his actions to the police.<sup>102</sup> In the case, the outcome occurred because the police force had not looked at the documents and had made their decisions without following the proper procedure. Because of Ombudsman's intervention, the Thai Police put in place improved procedures for dealing with lost license plates, so that fairness and fair handling of the matter have become embedded in the police's decision-making. Further, following the Ombudsman's recommendation, the Department of Land Transport responsible for the issuing of license plates considered measures to provide for faster services.

The most recent example of the Ombudsman's work which resulted in wider impact on administrative procedure is its recommendation that a citizen should only provide a copy of the front of the ID card when a copy of the ID card is required in contacting the government offices, instead of a copy of identification card on both sides as before. This measure reduces the administrative burden, as well as the cost to the public, which is in accordance with the principles of good governance.

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<sup>101</sup> The Thai Ombudsman Office, *Twelve Years*, n. 58.

<sup>102</sup> Chief Ombudsman Panit Nitithanprapas, 'Daily Complaint Handling Toward a Systemic Approach,' n. 31.

Following the recommendation, the Ministry of Interior issued a notification dated 22 March 2556 B.E. (2013) implementing the recommendation of the Ombudsman.

The above cases give typical examples of how the Thai ombudsman has operated to encourage better, effective functioning of the administration by identifying defective procedures and regulations that need improvement corrections. This type of work is in line with the ombudsman reports elsewhere in the world and represents good practice.

### ***Law reform***

Like in the case of some other Ombudsmen schemes, the Ombudsman in Thailand has an important role as a law reformer also (see Chapter 4). Sometimes, in the course of the investigation of a case, the Ombudsman may find that the government official concerned acted lawfully but because the law itself is outdated or defective the result has been inequality or discrimination for the complainant. In such a case, the Ombudsman shall forward his recommendation for amendment of the law in question to the concerned agency for suitable amendment.

The Ombudsman's recommendations in this regard have led to a number of positive changes in existing legislation. By way of example, the Person Name Act 2505 B.E. (1965) was amended to allow women the right to choose a family name after the Ombudsman's recommendation which stated that a provision which required a married woman to take her husband's surname is discriminatory and unfair. Another example is the amendment of the Revenue Code clauses<sup>103</sup> that disallowed married women from including their non-earned income when filing a separate tax return. These clauses were viewed as unfair to married women, who have to pay more taxes than unmarried women because some of their income is combined with their husbands, which is usually taxed at a higher rate. Another example is the amendment of the Act on Establishment of Administrative Court and Administrative Court Procedure 2542 B.E. (1999). The amendment resulted in court fees being exempted by filing a declaration of lack of funds for cases relating to administrative contracts.<sup>104</sup>

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<sup>103</sup> Articles 57(3) and 57(5). Some women have divorced their husbands to avoid paying higher taxes because of these clauses.

<sup>104</sup> Article 45/1.

The three examples above illustrate aspects of the reforms in law which have been the cause of grievances to a complainant (s), and which the Thai Ombudsman has used to help achieving justice for the weak and the poor.

### ***Impact on administration***

The extent to which the Ombudsman can have an impact on public administration as a whole is difficult to quantify,<sup>105</sup> but the available evidence detailed above suggests that the Ombudsman can discover the root causes of maladministration in cases involving a large number of complaints and encourage the public body concerned to change its practices accordingly in order to improve the quality public services. Further, in a number of cases the Ombudsman has proved to be an effective mechanism in solving problems involving responsibilities of more than one department, which in general cannot be solved by one of them alone, as crossover jurisdictions are not accepted easily. This is because unfortunately organizational interests and inter-bureaucratic competition created barriers among officials.

It is evident from the Thai Ombudsmen's reports that there have been considerable initiatives taken recently to address systemic issues at the national policy level. It is also evident that it is more difficult to succeed with recommendations which represent proposals for the formulation or alteration of specific policies than with those which merely relate to the addressing of a specific administrative problem. This is understandable, since in such cases the realisation of the recommendation depends on numerous actors. It can be seen in this chapter that the Thai Ombudsmen's success rate in proposing changes in policy is not good.

On the other hand, the Ombudsman's investigations have successfully revealed on more than one occasion a lack of inter-departmental coordination and related problems of compartmental mentality, as well as problems of unclear delineation of responsibility between different departments which have directly caused many complaints. It also evident that, in such cases, the Ombudsman's status as a neutral body makes it a suitable organisation to propose improvement for all concerned departments. In this respect, the Thai Ombudsman has enjoyed considerable success.

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<sup>105</sup> Buck et al., n. 14.

### 6.3 Conclusion

The legal provisions and arrangements for the Thai Ombudsman in terms of its 'good administration' mandate seem adequate for Thailand and also consonant with the ombudsman's traditional roles. As a legal institution, it is intended to provide protection to the peoples' rights against all forms of bureaucratic maladministration and to deal with injustice in public service. The Ombudsman has jurisdiction over all public servants, public authorities and ministerial departments. The various arrangement in place provide for easy access to the Office by a wide range of people, including those geographically remote from the capital and who lack financial or other resources. The Ombudsman's practice and strategies to raise public awareness have been noted to be as good as any practice in the ombudsman community. In short, the foundations of the Thai Ombudsman scheme appear strong.

A review of the stakeholders', as well as the incumbents', intentions reveals that the Ombudsman remains focused on traditional concerns, such as maladministration and injustice against citizens, while there is an increasing demand that the Ombudsman expand his scope to deal with a broader range of issues. A continued focus on the 'case business' for an ombudsman is appropriate.

A review of the Ombudsman's actions taken upon the complaints before him has showed that he has been able to serve a need in the area of administrative justice. The initial fear that he would duplicate the Administrative Court has proven unfounded by the fact that the Ombudsman has a distinctive contribution to make compared to the courts in terms of norms and procedures adopted. As a result, the Ombudsman has emerged as an important avenue for individual complaints against the actions of public authorities, even though its operations are not based on powers of enforcement. This finding shows that the Ombudsman office is doing its work effectively and in line with its mandate.

However, there are issues worthy of further consideration. To begin with, there is evidence that the Ombudsman Office has not effectively met its own targets in terms of throughput time in resolving complaints, and that the institution may have not been widely used by complainants despite findings that suggest that it has a suitably wide jurisdiction, high level of social awareness and easy access. This may perhaps best be illustrated by the high amount of backlog cases each year and the relative small number of complaints received by the Office.

Increasingly, the Ombudsman has also sought to improve the administrative process by making recommendation regarding the changes of administrative procedure and the legislative amendments. The former is another area in which the Ombudsman has been shown to be effective in raising the standard of performance of administrative agencies. In particular, the Thai Ombudsman has identified the lack of inter-departmental coordination and related problems of compartmental mentality. Recently, the incumbents of the office have been anxious to tackle problems in existing public policies through the office's systemic powers. However, the findings in this study suggest that most of the Ombudsman's recommendations made regarding public policies have not been implemented by the organisations concerned.

Overall it can be said that the Thai Office has yielded some of the results that were envisaged when it was originally established in Thailand, as well as in other countries: in particular in terms of protecting the rights of the people. However the policies of each nation vary, which have caused the offices to be shaped to its individual needs and requirements. To this issue I will return in Chapter 9 to analyse the extent to which the ombudsman office might be able to enhance its performance, but in the next chapter I will study the additional functions of the Thai ombudsman to identify the degree to which the office has made an impact in practice.

## **Chapter 7**

### **The Additional Roles of the Thai ombudsman**

In the previous chapters (Chapters 5-6) it has been identified that the Thai Ombudsman was established to perform the traditional role of the ombudsman, and how the Thai Ombudsman has performed such a role has been explored. This chapter focuses on the non-traditional functions of the Thai Ombudsman, namely reviewing complaints about the constitutionality of public sector activity, which was originally assigned to the Ombudsman when it was established by the 1997 Constitution; and two other functions which were added to the institution's remit by the 2007 Constitution, namely monitoring and evaluating implementation of the provisions of the Constitution by government agencies, and monitoring the enforcement of codes of ethics for political office holders and state officials. These latter two functions were added by the 2007 Constitution because the drafters of the Constitution wanted to raise the profile of the Ombudsman, which was perceived as under-performing; and to respond to the need to strengthen controls over the executive branch.

However, the additional roles have often caused the Ombudsman to face negative criticism, especially those new powers created under the 2007 Constitution. Further, there is little evidence that the additional roles have resulted in raising the profile of the Ombudsman Office as intended. Instead there has been a growing intensity of comment on these roles, and debate as to whether they are appropriate for the institution. Some academics have come to the view that the additional powers are not suitable for the institution. A prevalent perception has also developed that the Ombudsman has not demonstrated its full capacity or failed to effectively perform its new constitutional role as a proactive watchdog in overseeing the executive.

On the other hand, arguably it may not be fair nor appropriate, at this point in time, to judge the experiment as a failure, as one might argue that the Ombudsman has established for 14 years and it has been only eight years since the adoption of its new mandates. In this regards, it is worthy to note that these increases of power under the 2007 Constitution were unplanned and instantaneous, as the drafters of the



Constitution granted such without prior consideration on the roles and their impact on the Ombudsman Office<sup>1</sup> and at present a number of perspectives still remain relatively under-explored. However given that a new process of constitutional drafting has been set in motion by the 2014 coup with an aim to have a new democratic constitution drawn up within a year, it is a very good time to reflect the position, mandate and power of the Ombudsman in the Thai Constitution.

It is against the background of this perception of poor effectivity that this chapter examines the powers of the Thai Ombudsman that are considered non-traditional and the ways in which the Ombudsman has practically utilised them to accomplish his mission. The chapter aims to understand the intention behind the relevant Constitutional provisions and examines whether the Thai Ombudsman has been able to achieve the results intended by the Constitution. In order to achieve these aims, this chapter is divided into three sections. Section 7.1 provides an overview of the legislative framework of the Ombudsman's additional powers and mandates. It contains an examination of the basis and purpose of the additional functions in the 2007 Constitution. The discussion in the drafting process of the 2007 Constitution will be examined to appreciate the grounds underpinning the adoption of such functions. In section 7.2 the implementation of the legislation is explored. In this section issues relating to the difficulties in the implementation will be analysed, so as to understand the current debate on the advantages and disadvantages of the functions and what has been achieved. Further, an assessment is made of whether the Ombudsman can fulfil its additional constitutional mandates. Section 7.3 concludes the chapter.

In relation to the previous chapter, as has already been explored, the Thai Ombudsman has anchored itself in the traditional role of redressing grievance and improving administrative practice. This chapter provides empirical evidence of the accomplishment and the difficulties the Ombudsman faces in performing additional functions. This finding will be analysed in Chapter 9 using the analytical framework developed in Chapter 4.

Having identified issues relating to the difficulties in the implementation of additional functions of the Ombudsman in Thailand, this chapter places the debate

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<sup>1</sup> The then First Vice President of the Senate Surachai Liengboonlertchai (now the President of the Senate), in an interview with the author on 1 March 2013, The Government House, Bangkok,

into the international context of the ombudsman with regards to the acquisition of its new roles. As this chapter will argue, notwithstanding the willingness of the constitutional drafters to entrust important functions to the Ombudsman, there have been various difficulties that obstruct its performance of the additional roles that it has been granted. Some of the new mandates could burden the Ombudsman, as it lacks the expertise and capacity to perform these functions well. More problematically still, since the ombudsman institution's ability to be successful normally depends upon it being perceived by all stakeholders as a politically neutral institution, in Thailand the attempts to fulfil these additional roles have led the institution into unhelpful political conflicts and this would likely affect its ability to perform effectively its core roles in administrative justice.

## **7.1 Powers available to the Thai Ombudsman**

In this first section, a legislative overview is provided in order to provide an understanding of the power available to the Thai Ombudsman to perform the additional roles, as well as the intended meaning and purpose behind such powers. Reliance will be mainly placed upon the official papers of the Constitutional Drafting Assembly and the views of its members. The discussion focuses on three core powers: reviewing complaints about the constitutionality of public sector activity; monitoring and evaluating implementation of the provisions of the Constitution by government agencies; and monitoring the enforcement of the code of ethics for political office holders and state officials.

### **7.1.1 Constitutional litigation**

A power to commence constitutional litigation is an additional ombudsman power which is often found in human rights ombudsman schemes in civil law countries, such as in Spain and Latin America.<sup>2</sup> These ombudsmen have a mandate of human rights protection and promotion, in addition to investigating complaints concerning irregularities in the public sector. Such ombudsman schemes often use international human rights law and constitutional and other domestic human rights

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<sup>2</sup> Linda C Reif, 'Enhancing the role of ombudsman institutions in the protection and promotion of the rights of persons with disabilities', Conference Papers, Wellington, 2012, retrieved 27 October 2013, [file:///C:/Users/Home/Downloads/Wellington%20Conference\\_14.%20Working%20Session%20B\\_Linda%20Reif%20Paper%20&%20Slides%20\(1\).pdf](file:///C:/Users/Home/Downloads/Wellington%20Conference_14.%20Working%20Session%20B_Linda%20Reif%20Paper%20&%20Slides%20(1).pdf) August 10, 2012.

norms in support of their work.<sup>3</sup> In doing so, they can bring matters to the constitutional court and the administrative court to determine the constitutionality of laws, treaties and/or other government action. This type of power is considered desirable because it can enhance the role of the ombudsman institution in protecting and promoting the rights of persons, as well as operating as a complementing power to the ombudsman's core investigating mandate.<sup>4</sup>

In Thailand, the Thai Ombudsman is conferred with the power of constitutional litigation by the 2007 Constitution and the Organic Act on Ombudsman 2552 B.E. (2009) - in this work it is referred to as the 2009 Act. But the Thailand has separately established the Office of the National Human Rights Commission as the principal human rights institution. Therefore, the Ombudsman's powers to request the Constitutional Court and Administrative Court to determine on matters of constitutionality are linked to an aim to establish a robust legal system which prevents the violation of constitutionally entrenched rights, rather than human rights in particular. This can be seen in the wordings of Section 245 of the 2007 Constitution and section 14 of the 2009 Act which empower the Ombudsman to refer a matter, together with the opinion of the Ombudsman, to the Constitutional Court or the Administrative Court in a case where the Ombudsman considers that any provisions of law, by-law, order or any other act of any public officials raises question-marks about the constitutionality of the measure, or its compliance with superior laws.

The main tool to achieve this is contained in the Constitution itself, which creates a special institution outside the traditional judicial, legislative and executive structure-the Constitutional Court/ the Administrative Court- to determine the constitutionality of legal activity. These courts are vested with the power to strike down primary legislation, by laws and general administrative action where it is incompatible with the constitution.<sup>5</sup> The Constitutional Court and the Administrative Courts, together with the Ombudsman, provide a system for the judicial review of legislation and administrative action. Such an approach is considered necessary not

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<sup>3</sup> *ibid.*

<sup>4</sup> Linda C. Reif, 'Transplantation and Adaptation: The Evolution of the Human Rights Ombudsman', *Third World L.J.* 31B.C. 269, 2011, retrieved 26 August 2013.

<sup>5</sup> The Constitution of Thailand 2550 B.E. (2007), Sections 4, 141, 154, 211, 212 and 216.

only to foster the supremacy of the constitution but also to safeguard the citizens' rights against unconstitutional governmental actions.<sup>6</sup>

Previously, a problem of unconstitutionality of enacted legislation which may affect a citizen's constitutional right could only be raised during the course of court proceedings in which the challenged provisions of any law applied to a case before the court. In such circumstances, the presiding court, on its own initiative, or by petition from one of the parties (concrete review), could look into the constitutionality of the law and refer matters to the Constitutional Court for judicial review if the law affects the constitutional right and whether they are contrary to the constitution.

As a result, both the 1997 Constitution and the subsequent 2007 revision provided an additional channel for review process in which the review proceeds in the absence of a concrete judicial case. Such reviews are triggered by the input of designated independent organisations, such as the National Human Rights Commission<sup>7</sup> and the Ombudsman himself.

This process means that a person is entitled to lodge a petition through the Ombudsman to refer a matter to the Constitutional Court and to request a declaration of unconstitutionality of the enacted law, without the need to prove that his or her right is affected by the provision. Further, this process is considered a preventive measure since it allows the system to filter out unconstitutional laws before they can harm people.

### **7.1.2 Monitor and evaluate the implementation of the Constitution**

The 2007 Constitution contains the directive principles for the implementation of fundamental State policies, as well as spells out the time frame for enacting law.<sup>8</sup> The directive principles of fundamental State policies are intended to provide constitutional directions which the government is required to follow in making legislation and determining policies for the administration of State affairs.<sup>9</sup>

At the time of the making of the 2007 Constitution, the constitutional drafters were of the view that despite these provisions being in place in the past, actual

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<sup>6</sup> Borwornsak Uwanno, 'The Constitutional Court in the 1997 Constitution of the Kingdom of Thailand', *King Prajadhipok's Institute Journal*, Vol. 1, 2003.

<sup>7</sup> The Constitution of Thailand 2550 B.E. (2007), Section 257.

<sup>8</sup> The Constitution of Thailand 2550 B.E. (2007), Chapter 5.

<sup>9</sup> The Constitution of Thailand 2550 B.E. (2007), Section 75.

implementation of the provisions of the Constitution was not effective because there was so much delay in the enactment of the legislation, administrative rules and regulations required to put the constitutional provisions into effect. Because of such shortfalls, the goals of the Constitution had not been fully achieved.

The Constitutional Drafting Assembly viewed that one reason that this outcome occurred was because there was no formal mechanism responsible for monitoring and examining the results of the implementation of the Constitution by state agencies. Therefore, in order to ensure that relevant processes in the preparation of Bills and other legal instruments are undertaken in a timely fashion, it was deemed that there should be a body charged with the function of monitoring, facilitating, coordinating and overseeing the development of the legislation and administrative procedures.<sup>10</sup> Since it was not considered economically and politically viable to set up a new agency, the task was assigned to the Ombudsman.<sup>11</sup> As a result, Section 244 (3) of the 2007 Constitution stipulates that the Ombudsman has the powers and duties to monitor, evaluate and prepare recommendations on compliance with the Constitution, including considerations as to amendment of the Constitution, where it is deemed necessary.

The Ombudsman's role regarding follow up, evaluation and making recommendations on constitutional compliance functions is another important development in Thailand because previously there had been no such organisation performing this function. However it should be noted that the Ombudsman is not the only institution that is tasked with this function, as the 2007 Constitution also set up the Law Reform Commission to improve and develop the law in the country, including recommending amendments to the law so that it is in conformity with the constitution with regard to the public opinions and hearing by the people affected by those laws.<sup>12</sup>

In performing this role, there are at least two issues which would likely pose challenges for the Thai Ombudsman. First, although the new Constitution put in place an institutional process to enforce the implementation of constitutional provisions, it does not prescribe methods and criteria for evaluation of whether a

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<sup>10</sup> Minutes of the Meeting of the Constitutional Drafting Assembly 34/2550 (extraordinary), Tuesday 26 June 2007.

<sup>11</sup> The then First Vice President of the Senate Surachai Liengboonlertchai (now the President of the Senate), an interview with the author on 1 March 2013 at the Government House, Bangkok.

<sup>12</sup> The Constitution of Thailand 2550 B.E. (2007) Section 81 (3).

provision has been sufficiently implemented or not. Instead, it leaves it to the Ombudsman to decide and determine the sufficiency of efforts to implement the constitution. Perhaps unsurprisingly, it will be seen that this unclear provision has created a difficult challenge for the Ombudsman to overcome. Secondly, the fact that the Constitution is designed to radically reconfigure the political, legislative, judicial and administrative machinery of government means that this undertaking itself is a massive challenge. Part of the task would require the review of significant numbers of active legislation and sub-ordinate legislation in order to ensure that all implementers in all government institutions integrate constitutional rights in their legal and policy frameworks. In short the task entails a massive workload. For this reason alone, it is questionable whether the Ombudsman can carry out this task effectively. The Asian Development Bank has estimated that working out all of the implications and ensuring that the new practices and procedures will function effectively will take at least a generation.<sup>13</sup> In other jurisdictions this function is undertaken by a specialised body, such as a Commission for the Implementation of the Constitution.<sup>14</sup>

### 7.1.3 Ethical Codes enforcement

A concern with public service ethics has emerged internationally during recent years and has been an ongoing theme in Thai politics.<sup>15</sup> While the 1997 Constitution requires government agencies to conform to ethical standards in order to prevent corruption, misconduct and enhance operational effectiveness, it did not provide a mechanism to enforce effectively or impose penalties in the case of violation of ethical standards.<sup>16</sup> Ethics therefore became an issue that each organisation addressed individually.

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<sup>13</sup> Asian Development Bank 'Governance in Thailand: Challenges, Issues and Prospects', ADB, Manila, April, 1999.

<sup>14</sup> Commission for the Implementation of the Constitution, Nairobi, Kenya.

<sup>15</sup> The move could be in part attributed to the U.N. Convention Against Corruption who in 2003 included a public service code as an essential element in corruption prevention, retrieved 19 September 2014, <http://www.un.org/News/Press/docs/2003/soccp270.doc.htm>, see S C Gilman, *Ethics Codes and Codes of Conduct as Tools for Promoting and Ethical and Professional Public Service: Comparative Success and Lessons*, *Comparative Successes and Lessons*, paper prepared for the PREM, the World Bank, Washington DC, winter 2005, retrieved 10 August 2013, <http://www.oecd.org/mena/governance/35521418.pdf>.

<sup>16</sup> The Constitution of Thailand 2540 B.E. (1997), Section 77.

The drafters of the 2007 Constitution concluded that this was an unsatisfactory solution because ‘in reality the moral standards and code of ethics have had no bearing, and certainly were hardly binding on anyone.’<sup>17</sup> The most serious problem of all, it found, was the conflicts of interests that existed in the public sector, a grey sort of corruption that Thai law has yet to catch up with.<sup>18</sup>

The 2007 Constitution therefore aimed at invoking improved compliance to a Code of Ethics and introduced a new ethical framework by (i) stipulating that as of September 2008 all holders of political office and State agencies shall have its own Code of Ethics<sup>19</sup>; (ii) setting up mechanisms and working systems to ensure the effective enforcement of the ethical standard; (iii) and imposing penalties on violation of the ethical standard based on the severity of the case e.g. serious violation of, or non-compliance by holders of political office with ethical standards is liable to be cited as a cause leading to removal from office or disciplinary penalty in the case of public officials.<sup>20</sup>

According to the 2007 Constitution the Codes of Ethics refers to standards to which public officials are expected to conform. As this has developed in the Thai government, it provides guidance for officials as to how to behave in their professional and personal conducts or practice so as to maintain the dignity of the profession and to be worthy of public trust. The subsequent codes are more subtle and delicate than law and are aimed at greater transparency and accountability.<sup>21</sup> Breach of a code is not the same as corruption or criminal offense. However, the failure to follow certain aspects of the guidance offered in the code of ethics may leave an individual open to accusations of corruption or attempts at corruption.

The Constitution emphasizes the importance of ethics by stating that in state administration policy and development, the working systems of the public sector

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<sup>17</sup> Somkid Lertpaithoon, ‘The Origins and Spirit of the 2007 Constitution’, in Wutthisarn Tanchai (ed.) *Exploring the 2007 Constitution, KPI Yearbooks 4*, King Prajadhipok’s Institute, 2007.

<sup>18</sup> *ibid.*

<sup>19</sup> The Constitution of Thailand 2550 B.E. (2007), Section 279.

<sup>20</sup> Section 270. A person holding a position of Prime Minister, Minister, member of the House of Representatives, senator, President of the Supreme Court of Justice, President of the Constitutional Court, President of the Supreme Administrative Court or Prosecutor General, who is under the circumstance of unusual wealthiness indicative of the commission of corruption, malfeasance in office, malfeasance in judicial office or an intentional exercise of power contrary to the provisions of the Constitution or law or seriously violates or fails to comply with ethical standard, may be removed from office by the Senate.

<sup>21</sup> The Ethics Manual, Office of the Civil Service Commission.

shall give regard to the development of quality, merit and ethics of State officials.<sup>22</sup> The monitoring of the exercise of state powers therefore not only follows the provisions under the Constitution and the laws, but also enforces observance of the code of ethics with the goal of ensuring that the exercise of state powers is honest and just, and violators shall be punished accordingly.

According to the 2007 Constitution Section 280, 244, 279, 280 and the 2009 Act, Section 36, the Ombudsman has a consulting role in making the code of ethics of each type of political office holders and public officials, with the purpose to ensure that codes meet standards and raise the ethical consciousness among political office holders and public officials. Additionally, with a view that complaints about breaches are made to the Ombudsman, the Ombudsman plays an important part as a mechanism that instigates the enforcement proceedings. After investigating the alleged breach of the Code of Ethics, if the Ombudsman is of the opinion that there is an incident of violation of the code of ethics, the Ombudsman will need to decide whether the violation is a serious offence, in which case the Ombudsman will need to submit the matter to the National Counter Corruption Commission for consideration for removal from office; or if it is not a serious offence the Ombudsman will need to report to the authority concerned: in the case of violation or non-observance by a person holding a political position, the Ombudsmen will report it to the National Assembly, the Council of Ministers or the local assembly concerned.

Despite the fact that the Ombudsman does not have the power to impose penalties, he can conduct an inquiry and disclose the results of the inquiry to the public if the Ombudsman is of opinion that the violation of the ethical standard concerned is serious or there is a reasonable cause to believe that action taken by the person in charge will not be in a fair manner.

The Constitutional revisions to include an ethical code, and establish the Ombudsman's engagement as an external scrutiny process, have introduced an additional control to an existing self-regulatory based system for defining the standards of conduct expected of persons exercising public powers. The approach is designed to promote high standards of personal ethical conduct, thus creating an environment in which misconduct, corruption and fraud are less likely to occur.<sup>23</sup>

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<sup>22</sup> The Constitution of Thailand 2550 B.E. (2007), Section 78 (4).

<sup>23</sup> The Ombudsman Annual Report 2547 B.E. (2011).



However, there are two issues that can be identified from the present legislation which may cause difficulties for the Ombudsman in carrying out this function. First, there is an issue of interpretation and application of the Code of Ethics. The legislation does not define what could be a 'serious offence'; meanwhile the Codes of Ethics are more aspirations of broad principles than hard law. Another issue with the current legislation is its impact on the Ombudsman's relationship with the executive branch and the administrative system more generally upon which the Ombudsman relies for its corporation in order to be effective. It is probable that this additional investigatory function will result in potential conflict between the Ombudsman and the main branch of government, the executive and its administration. This is especially the case now that the Ombudsman has been given a mandate that involves making arguably moral judgements of political action, as well as of personal conduct of public officials and political office holders. Given this, the instigation of enforcement proceedings by the Ombudsman could result in serious consequences, such as disciplinary action in case of public officials or removal from office in the case of political office holders.

From the analysis of the potential difficulties of the Thai Ombudsman, it might be useful to note that in other countries equivalent codes of ethics for parliamentarians are separately administered by a bespoke body. Examples include the Commissioner for Ethical Standards in France, the Canadian Conflict of Interests and Ethics Commissioner or the Irish Standards in Public Offices Commission. There are ombudsmen for which part of the office's role is to investigate complaints regarding ethical standards and codes of conduct of members of local government bodies, such as the Public Services Ombudsman for Wales, but it is noticeable in Wales that the role interlinks with a separate judicial process and relates to local government only, not the National Assembly of Wales itself. In this respect, therefore, the Thai Ombudsman's power to monitor the code of ethics of the national politicians appears strong when compared to the ombudsman community as a whole.

### ***Implication of the additional functions***

This section has outlined the body of legal provisions regulating the additions to the role of the Thai Ombudsman and each of them was individually assessed. It is now time to step back and take a look at the entirety of the emerging picture. Stanley

de Smith's comment quoted earlier in the thesis becomes relevant here.<sup>24</sup> Different jurisdictions will approach the widening and narrowing of the Ombudsman's jurisdiction differently depending upon local context. In Thailand the legislature has crafted a law that clearly enhances the roles of the Thai ombudsman, in which contrasts with the strategy adopted in other jurisdictions of establishing other bespoke supervisory agencies, such as the Commission of Constitution Implementation, or the Ethics Commissioner, to perform such tasks. There it was identified that a series of potential risks face ombudsman schemes with an expanded mandate included incompatibility of roles, subjecting the Ombudsman to politically controversial areas and the problems of institutional overload due to insufficient of resource and expertise.

The Thai Ombudsman, with its constitutional importance and prestigious constitutional status as an impartial independent watchdog, seems to look suitable to undertake such an expanded monitoring function despite its limited experience as a young institution with a humble success record. But this section has identified some reasons for expressing concern as to the conferral of these additional roles, reasons which pick up on the issues raised in Chapter 4 of this thesis.

Overall, the section concludes that the legal mandate of the Thai Ombudsman is relatively diversified and extensive. There are a couple of findings that stand out and merit particular attention though. On one hand this increased power and mandate may enable the Ombudsman to raise its profile. On the other hand, more power may result in a higher level of public expectation and the Ombudsman risks negative criticism if the office cannot fulfil its mandate. In addition to issues of resources and expertise that the Office may require to perform its new mandate, in terms of political controversy, there are also good reasons to question whether the combination of ombudsman and the code of ethics is good one, given that it could embroil the Ombudsman into political conflicts. These issues will be examined further in the next section.

## **7.2 The functioning of the Thai Ombudsman**

The legal basis of the power of the Thai Ombudsman has been outlined. It may be seen that the Thai Ombudsman enjoys a broad limit. In many jurisdictions,

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<sup>24</sup> 'An Ombudsman cannot be bought off the peg; it must be made to measure', Professor S A de Smith (Constitutional Commissioner for Mauritius), Mauritius Legislative Assembly Sessional Paper, No. 2, 1965, para. 39.

some of these functions are performed by other bodies. This section discusses the manner in which the Thai Ombudsman has implemented these various additional powers and assesses their impact. Since there is not much written on these topics in the ombudsman literature, common indicators of the key aspects of the ombudsman's work that need to be explored in order to establish a suitable overview of their effectiveness are hard to find (see Chapter 4). Central to the discussion is, therefore, an examination of the effectiveness of the Ombudsman in achieving the result as intended by the Constitution. In view of the fact that these powers are a relatively recent developments (the powers were conferred to the Ombudsman in 2007 by the 2007 Constitution but it took two to three years for the Office to be able to start discharging these new functions), apart from the views of the public, the discussion here will primarily draw on the suggestions and experience of various stakeholders, plus available documentary evidence. For this reason any analysis and conclusions drawn will, of necessity, be of a preliminary nature. However, the section does provide some significant details on the unfolding difficulties that the ombudsman faces in performing these roles, as well as the achievements secured so far, and as such it is hoped that this research will be useful for future studies and debates.

### **7.2.1 Constitutional litigation**

The Thai Ombudsman primarily has a traditional mandate, it is also designed to provide a potential access point for citizens when faced with an act of public power that violates their fundamental rights or where there is a constitutional issue. Since this power was introduced, there is evidence to suggest that the Ombudsman has played an important role in providing access to the Constitutional Court for resolution under the powers described above.

The best evidence of the impact of the Ombudsman in this area is the casework that has resulted from the office's role. Examples of cases that the Ombudsman has brought to the Constitutional Court include the following:

In 2000, the Ombudsman brought an action arguing that a provision in judicial personnel law<sup>25</sup> which prohibited disabled persons from becoming judges was inconsistent with the Constitution<sup>26</sup> (which prohibited discrimination on various grounds such as health or physical condition). The Court ruled that the provision was

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<sup>25</sup> The Justice Personnel Act, Section 26 (10).

<sup>26</sup> The Constitution of Thailand 2540 B.E. (1997), Section 30.

constitutionally valid citing that the Judicial Commission had every right to recruit individuals ‘with optimum potential’ into its workforce.<sup>27</sup> There has been controversy and criticism on the Court ruling for failing to base its decision on inclusiveness and equal opportunity, as well as to protect the rights of the handicapped as mandated by the Constitution.<sup>28</sup> Following this case, the Ombudsman also made a separate recommendation to amend other legislations, administrative rules and regulations that he considered to have substance which prejudice the rights of disabled persons to engage in various occupations. The recommendation was submitted to Prime Minister, the President of the House of Representatives and the President of the Senate for further action but no action has been taken as yet.<sup>29</sup> Even though the Ombudsman’s submission was not successful, it is apparent that this submission raised a very relevant issue which has, at the very, least enhanced legal clarity and legal debate in this area.

In 2001, the Ombudsman applied to the Constitutional Court for a ruling on whether a provision of the Organisation of the Military Courts Act, 2498 B.E. (1955) that permitted military courts to pass judgement or a decision in cases without a hearing was unconstitutional. The Constitutional Court held that the provision was unconstitutional for being contrary to or inconsistent with Section 236 of the 1997 Constitution and therefore was unenforceable according to Section 6 of the 1997 Constitution.<sup>30</sup> Consequently, this ruling has changed the long practices of the military.

In 2002, a petition was made to the Constitutional Court asking it to determine whether a clause in the Bankruptcy Act 2483 B.E. (1940) was contrary to Sections 29, 48 and 50 of the 1997. The clause limited the right of debtors to participate in a debt-rehabilitation plan for their business and thereby affected a person’s right in property and the liberty to engage in an enterprise or to undertake in a fair and free competition. The court held that the clause was not unconstitutional because even if the provision would restrict the rights and liberties of the debtor, such restriction was

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<sup>27</sup> 16/2545, 30 April, 2002.

<sup>28</sup> Andrew Harding, ‘A Turbulent Innovation: the Constitutional Court of Thailand 1998-2006’, in Andrew Harding, Penelope Nicolson (ed.) *New Court in Asia*, Routledge, London, 2009.

<sup>29</sup> Siriya Promradyod, *The problem of legal status and authority of the Ombudsman under the Constitution of the kingdom of Thailand*, Master’s Degree Thesis, Thammasat University, 2010.

<sup>30</sup> 24/2546, 26 June 2003.

imposed to the extent that was necessary and did not affect the essential substance of such rights and liberties.<sup>31</sup>

Such examples of practice by the Ombudsman institution in the formulation of the objections of unconstitutionality demonstrates the institution's contribution in term of identify and submitting to the Constitutional Court for remedy those poor regulations which may introduce cumbersome mechanisms or generate violations of fundamental rights and freedoms.

In all these of cases that fall under the power the Ombudsman to pursue constitutional justice on behalf of the citizen by providing the people with a link and an alternative means of gaining access to the Constitutional Court. Nonetheless in the event of a problem on the constitutionality of provisions of laws, this does not mean that the Ombudsman is bound to refer every case received to the Courts. The procedure begins with the usual preliminary screening to see if the complaints are within the Ombudsman's jurisdiction before determining if the objects of complaint, i.e. the law, by-law or an act pose a question of constitutionality. The Ombudsman then submits the case to the court, together with a preliminary opinion as to the constitutionality of the act, or law under scrutiny. The Ombudsman practice reveals that the office has never referred a case to the Courts if he opines that there is no question of constitutionality or legality issues.<sup>32</sup>

To date the Ombudsman has received 261 complaints on unconstitutionality, of which in 189 the Ombudsman found the complaint did not include an unconstitutional item of law, yet in 36 the Ombudsman did find the relevant law to be unconstitutional and referred the complaint to the courts which was then accepted for a hearing.<sup>33</sup> In the majority of these cases, the Ombudsman's opinions were upheld.<sup>34</sup> But even though not all of these complaints have been successfully upheld, the Ombudsman has achieved an important impact in terms of harmonising of law with the constitution on some occasions, and providing a route by which reassurance

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<sup>31</sup> 64/2547, 4 November 2004.

<sup>32</sup> This interpretation was affirmed by the Constitutional Court decision number 20/2546 which indicates that if the Ombudsman preliminarily considered that the petition did not contain a question of constitutionality, the Ombudsman might cease consideration. In such a case, the Ombudsman is not required to refer the case with his opinion to the Constitutional Court or the Administrative Court, as the case may be.

<sup>33</sup> As of December 2013.

<sup>34</sup> The Ombudsman Office, 'Introduction', *A Collection of the Ombudsman's Opinions*, Rongpimduentula Press, Bangkok, 2010. Unfortunately the Ombudsman did not provide statistical data; therefore the numbers of submissions by the Ombudsman that the courts have upheld were unable to be obtained.

can be provided that the constitution is being upheld. Given the need to uphold the strength of the Constitution, arguably there is a benefit in conferring an independent body, such as the Ombudsman, the special responsibility for pursuing matters allegedly in conflict with the Constitution.

Another important aspect of the Ombudsman's power in lodging petitions which request an *ex post* review of the law is that, in doing so, the Ombudsman serves as a neutral means to induce control of the law, as against the constitution. Importantly, this is a process that operates outside the more directly political attitudes of other legitimate individuals, such as MPs, or other designated institutions such as the Council of Ministers. Important as the political process of control is, as argued in Chapter 2, strong liberal democratic constitutions require such separation of powers to be embedded within their constitution. A good example of the powerful impact of such a role is the Ombudsman's of complaint it received which cited irregularities in the way the Thai Election Commission had set up the election. Further the complaint argued that the short timeframe provided for the staging of the election, 35 days, was unfair because it benefited the ruling party and put the opposition parties at a disadvantage. These complaints were duly referred by the Ombudsman to the Constitutional Court for resolution. The Constitutional Court ruled on 8 May 2006 that the General Election was void and would have to be held again.<sup>35</sup>

While petitioning for unconstitutionality to the Constitutional Court regarding laws approved by Parliament is apparently not part of the Ombudsman's everyday work, considering the thousands of complaints received from citizens annually, it is one of the most important aspects of the Thai's Ombudsman's mandate. This reference to the Constitutional Court to produce judgement on unconstitutionality of law not only provides a binding decision on the complainant but also will benefit public at large.<sup>36</sup> Constitutionally, this is an interesting role for the ombudsman, but one which does not directly challenge understandings of its basic institutional design. This is because, in practice, the Ombudsman operates as a procedural access route to the court, rather than as a proactive force or an adjudicator of constitutional questions. Under the constitution it is clear that the ability to oversee the constitution effectively largely depends on the Constitutional Court or the Administrative Court which have

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<sup>35</sup> Constitutional Court Decision, Retrieved 23 October 2013,

[http://www.concourt.or.th/concourt/judgement\\_sum.jsp](http://www.concourt.or.th/concourt/judgement_sum.jsp).

<sup>36</sup> The Constitution of Thailand 2550 B.E. (2007), Section 216, paragraph 5.

power to adjudicate, not the Ombudsman. Regardless of whether the Constitutional Court upheld the Ombudsman's findings or not, it is worthy to point out that the Ombudsman has served its function as a mechanism to protect citizens' constitutional rights.

### **7.2.2 Monitor and evaluate implementation of the Constitution**

In practice, the Ombudsman's monitoring duties under the constitution are conducted through three broad activities: monitoring implementation, evaluating compliance and proposing constitutional amendments.

#### **Monitoring constitutional implementation**

The Ombudsman's task in this area is to follow up the work of those agencies responsible for taking action to implement constitutional provisions within the timeframe prescribed by the Constitution, and to report the progress. The Ombudsman has the power to request a government agency to give statements and report on their performance for consideration. If the agency has not reported on its implementation of the Constitution, the Ombudsman may submit such incorporation to the Council of Ministers, the Parliament and the Senate.

As noted above, effective implementation entails numerous laws and administrative measures to be enacted and put in place. The Ombudsman has estimated that to implement the fundamental State policies, as intended by the Constitution, involves the enactment of 326 new laws and as many as 3,451 administrative measures to be put in place.<sup>37</sup>

To deal with the scale of the task, the Ombudsman initially collaborated with the Secretariat of the Council of Ministers to collect data on this matter.<sup>38</sup> This was a more realistic approach because the Council of Ministers (the Cabinet) has a constitutional obligation to prepare annually the planning of legislation deemed necessary for the execution of the administration policies. It also has a national administration plan that details the measures and directions of official operations for each year of the administration of the Government, in accordance with the directive principles of fundamental State policies. However, according to Ombudsman Professor Sriracha Charoenpanich, after the new government took up office, collaboration from the Secretariat of the Council of Ministers ceased to be made

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<sup>37</sup> The Ombudsman Annual Report 2556 B.E. (2013).

<sup>38</sup> *ibid.*

available. The Ombudsman therefore requested the cooperation of the individual agencies on progress by sending updated reports to the Ombudsman every quarter.<sup>39</sup>

After monitoring and evaluating an implementation of the Constitution, the Ombudsman prepared and submitted a report, which includes recommendations for the implementation of the Constitution, to the person who controls or supervises the relevant agencies that appeared to fail to comply with the Constitution in any matter. The Ombudsman's staff are also assigned to monitor the constitutional operation outcome reports of these agencies in the mass media, and to maintain continuous telephone contacts to obtain the most up-to-date information.<sup>40</sup>

The Ombudsman prepared summary reports on the constitutional compliance of the different agencies, showing the number of legislation and administrative measures implemented which are included in the Ombudsman's annual report each year. Since July 2012 the Ombudsman has provided an online database on the implementation of the Constitution by public agencies; this can be accessed via the Office of the Ombudsman's website in order to allow the general public and the media to follow the progress and express their opinions on any matters.

The Ombudsman reported that by 2013 it appeared that 64% of legislation and administrative measures required by the Constitution have been put in place within the given time frame. There were 138 legislations and 851 administrative measures pending which were being follow upon by the Ombudsman to identify the cause of delay.

Despite the progress that appears to have been made towards implementing the Constitution, it is doubted whether this aspect of the Ombudsman's role has been as significant as the Constitution suggests it ought to have been. First, there is no evidence to suggest that (at least the Ombudsman has never claimed) that the implementation of the constitution so far could be directly linked to the Ombudsman's efforts, or legislation being enacted that would otherwise not have been. Therefore, it is difficult to measure the impact of the Ombudsman in this area due to the fact that, even where new legislation is passed, it may be argued that the improvement of the government performance in this regard be attributed to numerous

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<sup>39</sup> *ibid.*

<sup>40</sup> The Thai Ombudsman Office, 'Monitoring and evaluation of government agency's operations under the provisions of the Constitution', retrieved 23 October 2013, [http://www.ombudsman.go.th/10/eng/5\\_7.asp](http://www.ombudsman.go.th/10/eng/5_7.asp).



alternative factors, as opposed to being directly attributable to the Ombudsman's intervention.

Secondly, the new arrangement has led to a duplication of work between the Ombudsman and the Council of Ministers (the cabinet). The Council of Ministers is required by the Constitution to submit to the National Legislative Assembly an annual report on the result of its implementation of the directive principles of fundamental State policies, including problems and obstacles encountered. As pointed out above the Ombudsman statistics used in his report have been taken from the statistics prepared by the Council of Minister in order to report to the National Legislative Assembly. A question that follows from this practice is what benefit is there in submitting the same information to Parliament. In this regard, one might call into question the usefulness of entrusting this power by the Constitution to the Ombudsman.

Despite such difficulties, one could possibly argue that the Ombudsman has an important role to play concerning the enactment of the legislation and measures required by the Constitution. Such a claim would derive from the argument that it is necessary to have an external body to monitor the government. It is plausible that there is a psychological effect of being aware that someone is watching and will report if the work is not done properly, and that this effect will make the government perform better. This is precisely the challenge that constitutional systems are always trying to deal with because without adequate pressures governments do not always do the job properly.

### **Evaluating the implementation of the Constitution**

In order that legislation and measures meet the objectives of the Constitution, i.e. to ensure that the intentions of the Constitution are realized in practice, the Ombudsman is tasked with evaluations on the implementation of the Constitution. Unlike the monitoring task, through which the Ombudsman gathers the numbers of relevant pieces of legislation and reports, evaluation is a more comprehensive undertaking and requires qualitative analysis. This study reveals that in practice the Ombudsman has encountered a number of difficulties in performing this task.

This function has proven to be difficult to undertake without proper expertise. Perhaps unsurprisingly, therefore, the Ombudsman's Annual Reports from 2007 to 2013 did not show any details on the Ombudsman's performance on evaluation or

details of where the office had made recommendations with regard to the improvement of constitutional compliance. Evaluating whether legislation and measures meet the objectives of the Constitution is a complicated issue and must be treated with thoroughness. The Ombudsman has now appointed a committee consisting of constitutional experts to work on assessment criteria and working methods so as to create a standard assessment process that is acceptable to all parties.

But academics remain sceptical about the Ombudsman's expertise in this area. Prevalent comments made by academics so far are that to evaluate constitutional compliance would require constitutional analysis, a task that the Ombudsman was probably not well-equipped to perform with the human resources it has.<sup>41</sup> Even supporters of the Ombudsman have expressed disappointment towards the Ombudsman's performance and urged the Ombudsman to show concrete results of its performance in this area.<sup>42</sup>

In fact, in 2013 the Ombudsman for the first time stated in the Annual Report the results of the office's evaluations of constitutional compliance. However instead of coming up with assessment criteria and working methods to be used by the Office in evaluation constitutional compliance, as previously stated, the Ombudsman commissioned two research projects. They are 'The problem of education policy on free education for 15 years'; and 'the Evaluation of the Performance of the Political Development Council'. Based on these two research findings, the Ombudsman reported that the Office had found that the practice of government in implementing the Constitution is not consistent with the spirit of the Constitution.

There has been no evidence to suggest that Parliament and the public authorities concerned have responded to the Ombudsman's reports. Meanwhile, the approach of the Ombudsman has not been well accepted by all parties. Academic commentators have remarked that while the Constitution does not dictate the manner in which the Ombudsman evaluates the implementation of the Constitution, the Ombudsman's approach did not seem to be an appropriate way to evaluate whether

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<sup>41</sup> Professor Bunjerd Singkaneti, an interview with the author on 10 March 2013 at the National Institute of Development Administration (NIDA), Bangkok; State Councillor Professor Soonton Maneesawat, an interview with the author on 12 March 2013, Bangkok.

<sup>42</sup> The then First Vice President of the Senate Surachai Liengboonlertchai (now the President of the Senate), an interview with the author on 1 March 2013, at the Government House, Bangkok.

implementation of the constitution by public agencies is consistent with the will of the Constitution.<sup>43</sup> According to one commentator:

In my view, the fact that the Constitution entrusts the Ombudsman with such powers should be interpreted that the Constitution virtually requires the Ombudsman's expertise to carry out the task by himself rather than just having the Ombudsman finds somebody to do it. Research is acceptable if the findings can serve to feed into data capture and inform the work of Ombudsman. But at the end the Ombudsman must produce his own analysis and conclusion. What the Ombudsman is doing now is just acting as a messenger.<sup>44</sup>

Another commentator argued that to maintain this level of research into constitutional implementation would require the Ombudsman to carry out a massive quantity of work, most of which would probably end up like other research, gathering dust on the shelves.<sup>45</sup>

The above arguments illustrate the conflicting views on the ombudsman's role in this area and the challenges that it faces. But nor does it seem that the strategy of commissioning research, without the Ombudsman's direct input, is likely to yield a good result either. From the point of view of the constitutional drafters and some academics, this strategy would not meet their expectations, as it is the Ombudsman's input that is in theory valued. Unfortunately, the Ombudsman does not have or has not yet acquired the required knowledge and expertise for the task. Using such externally commissioned research simply serves to highlight the point that it lacks relevant expertise. So far the appointed committee has not finished working on the criteria and method that it will deploy for evaluation. This could further suggest the difficulties of the task.

Two more things are worth noting with respect to this role. One is that this additional role is not directly related to the Ombudsman's core role of providing protection for aggrieved citizens from the use of public power but it does make the Ombudsman an inspector of the government. The other is that prescribing a jurisdiction that is to some extent different from those that relate to its existing

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<sup>43</sup> Professor Bunjerd Singkaneti, an interview with the author on 10 March 2013 at the National Institute of Development Administration (NIDA), Bangkok; State Councillor Professor Soonton Maneesawat, an interview with the author on 12 March 2013, Bangkok.

<sup>44</sup> State Councillor Professor Soonton Maneesawat, an interview with the author on 12 March 2013, Bangkok.

<sup>45</sup> Deputy Permanent Secretary to the Prime Minister Office Kamon Suksomboon, an interview with the author on 29 March 2013, at the Government House, Bangkok.

jurisdiction poses considerable challenges to the Ombudsman, as well as tending towards converting the institution into a more generalist and less focussed outfit.

### **Preparing proposals for constitutional amendments**

After monitoring and evaluating, the Ombudsman is empowered to prepare proposals in support of Constitutional amendments if he considers it necessary.<sup>46</sup>

Since the promulgation of the 2007 Constitution, there was an attempt to amend this military-instilled Constitution. Several lawmakers from the then ruling party saw the constitution as undemocratic because it put in mechanisms to restrict democracy while, opponents see the 2007 constitution as a vital check against the government.<sup>47</sup> Eventually the parliamentarians who were members of the government proposed a controversial draft amendment to remove a number of its allegedly anti-democratic provisions. In response, the opposition party claimed that the government's plan to amend could be viewed as an attempt to overthrow the democratic regime and should be stopped.<sup>48</sup> Amid the then ongoing political conflict over the constitutional amendment,<sup>49</sup> the Ombudsman saw the opportunity to propose a draft for the constitutional amendment based on the power granted to it by the above constitutional provision.<sup>50</sup> The Ombudsman, therefore, appointed an advisory committee comprised of ten legal and political science experts<sup>51</sup> to advise on a constitutional amendment on which the Ombudsman then submitted a proposal to the

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<sup>46</sup> The Constitution of Thailand 2550 B.E. (2007), Section 244 (3).

<sup>47</sup> For example the appointed half of the Senate is filled with bureaucrats and military surrogates was viewed as a watered-down of version of democracy, less democratic and more elitist than the model laid out in the 1997 Constitution. See Thitinan Pongsudhirak, 'Thailand since the coup', *Journal of Democracy* 19, no. 4 (2008): 140-153.

<sup>48</sup> Sayuri Umeda Thailand: Move by Parliament to Amend the Constitution Law Library of Congress, [http://www.loc.gov/lawweb/servlet/lloc\\_news?disp3\\_l205403594\\_text](http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205403594_text); 'Court Puts Charter Changes on Hold', *The Nation*, Bangkok, 2 June 2012.

<sup>49</sup> More discussion see Michael J. Montesano, 'The Struggle to Amend Thailand's Constitution', *iseas*, no. 41, Singapore, 1 Jul 2013, retrieved 5 October 2014, [http://www.iseas.edu.sg/documents/publication/iseas\\_perspective\\_2013\\_41\\_the\\_struggle\\_to\\_amend\\_thailand's\\_constitution.pdf](http://www.iseas.edu.sg/documents/publication/iseas_perspective_2013_41_the_struggle_to_amend_thailand's_constitution.pdf).

<sup>50</sup> Ombudsman Pravit Rattanapian, Political News, *Thairath*, Bangkok, 20 February 2012.

<sup>51</sup> In 2012 the Ombudsman appoint a committee Comprising of renowned legal experts – Prof. Noraniti Setthabutr, former Chairman of the 2007 Constitution Drafting Assembly (CDA); Prof. Dr. Wissanu Krua-ngarm, former Deputy Prime Minister; Prof. Dr. Bowornsak Uwanno, Secretary-General of King Prachadipok's Institute; and Prof. Dr. Surapol Nitikraipot, former Rector of Thammasat University; four experts in political science – Prof. Dr. Sombat Thamrongthanyawong, Rector of the National Institute of Development Administration; Prof. Dr. Thiraphat Serirangsan, former PM's Office minister and political science lecturer of Sukhothai Thammathirat University; and Prof. Dr. Jaras Suwanmala, former Dean of Chulalongkorn University's Faculty of Political Science and former member of the 2007 CDA; and two lawyers – Prof. Dr. Prinya Thewanarumitkul, Vice Rector of Thammasat University, and Assoc Prof. Dr. Kittisak Porakati, a law lecturer of Thammasat University.

President of the National Assembly for consideration. The Ombudsman's version contained an opinion clearly different from that of the government, in particular with regards to the power of the major political organisations (such as the jurisdiction of the Constitutional Court and the power of the House Speaker).<sup>52</sup> Worse still the Ombudsman's version was interpreted by the government as acting in the interest of an opposition party whose manifestos addressed similar problems and promoted similar solutions.<sup>53</sup>

In this instance, it would seem that the Ombudsman took a view that it could work in parallel with other political institutions by an attempt to engage in the political debate on the constitutional amendments. However, this approach has not been welcomed by all. More than one commentator has expressed the opinion that this is an inappropriate activity for the Ombudsman to be engaged in as it has brought the Ombudsman under criticism for competing with the legislature. According to Bunjerd Singkaneti, a more appropriate approach for the Ombudsman would be for the office to operate as a supporting mechanism in identifying the obstacles preventing full implementation, and facilitating solutions that might solve the problems that impede implementation of the Constitution.<sup>54</sup> Similarly, Soonton Maneesawat viewed that by monitoring and evaluating government organisations in implementing the Constitution, the Ombudsman is in a good position to see where the problems lie, which sections have difficulties in execution, or what are/could be impediments to constitutional implementation.<sup>55</sup> As such the rationale behind the intention of the 2007 Constitution is that if any provision results in difficulties in practice or if there are any errors in the provision, then an amendment to the Constitutional provision may be necessary. Subsequently to the criticism, Chief Ombudsman Panit Nitithanprapas indicated that the Ombudsmen did not want a constitutional amendment or have an intention to compete with parliament but the

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<sup>52</sup> 'The Ombudsman pledged parliament to consider draft constitutional amendment', *Thairath*, 5 June 2012,

<sup>53</sup> State Councillor Professor Soonton Maneesawat, an interview with the author on 12 March 2013; see also Thaipublica, 'Prenatal defects in the constitution', 25 February 2012, retrieved 14 January 2015,

<http://thaipublica.org/2012/02/sombat-tamrongtanyawong/>.

<sup>54</sup> Professor Bunjerd Singkaneti, an interview with the author on 10 March 2013 at the National Institute of Development Administration (NIDA), Bangkok.

<sup>55</sup> State Councillor Professor Soonton Maneesawat, an interview with the author on 12 March 2013, Bangkok.

subject needed to be discussed in the interest of the public.<sup>56</sup> To date there is little evidence that the Ombudsman's efforts have created any effect on the ongoing constitutional amendment debate.<sup>57</sup>

From the discussion above, one important argument to be considered is that the roles regarding monitoring and evaluating the implementation of the Constitution and the preparing of proposals for constitutional amendments requires the Ombudsman to enter high political territory. Albeit the Constitution is a legal source of supposedly politically neutral aspirations – inevitably some of those aspirations will be value laden and even if they are not, there will always be residuary issues of how to implement them which are political. Plus of course, there are questions surrounding the costs and the appropriate speed of implementation through the Ombudsman's input. Arguably, these tasks are at a high policy level and involve highly politically debates – and should therefore be resolved in the political arena (as alluded to above), not in the courts or through the Ombudsman. In Thailand, both the difficulties the Ombudsman faces in performing such role and the struggles involved to deliver results could suggest that the political tasks are beyond the Ombudsman's territory. The proposed constitutional amendment is also a political action which affects the political organization of which normally is carried out by political institutions such as the government of the day or parliament. Getting involved in high political issues, in particular the constitutional amendments, may risk affecting the public's as well as politicians' perception of the political impartiality of the Ombudsman.

### **7.2.3 Ethical Codes enforcement**

The Ombudsman's exercise of its powers and activities in carrying out its duties with regard to Ethical Codes are examined in turn below.

#### **Formulation of the Code of Ethics**

While ethics is an issue that each organisation has to address individually, the Constitution requires that, apart from major values and professional ethics applicable to the professional characteristics of each organization, all codes of ethics shall consist of mechanisms and systems that ensure their effective enforcement, as well as

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<sup>56</sup> 'Chief Ombudsman did not advocate for the Constitutional Amendment', *Thairath*, 29 February 2012.

<sup>57</sup> State Councillor Professor Soonton Maneesawat, an interview with the author on 12 March 2013, Bangkok.

punishment procedures for imposing punitive sanctions in accordance with the degree of violation. The Ombudsman has duties to make recommendations or give advice in connection with the preparation or revision of the ethical standards, as prescribed by the Constitution.<sup>58</sup> The Constitution also requires that all agencies shall have their own Code of Ethics in place by 23 August 2008.<sup>59</sup>

In order to accelerate the preparation of codes of ethics, the Office of the Ombudsman compiled a list of agencies that must prepare them. It then issued a most urgent memorandum on 27 November 2007 to the Secretariat of the Cabinet to inform all government agencies to formulate their own Code of Ethics by 23 August 2008, requesting all agencies to deliver their Code of Ethics to the Office of the Ombudsman by the end of July 2008.<sup>60</sup> In order that each agency had sufficiently similar standards and measurements, the Ombudsman prescribed and published nine core values<sup>61</sup> which all ethics codes must incorporate, apart from major values and professional ethics applicable to the professional characteristics of each organisation.

The Ombudsman then collected the codes of ethics prepared by each organization and made sure that they had all the mandatory elements required by the Constitution. If the Codes of Ethics did not fully comply with the Constitution's requirement, the Ombudsman advised the agency concerned to make amendments in order to adhere to the Constitution. Workshops were held to provide guidance in preparing codes of ethics.

The Ombudsman reported that, as of December 2011, the Ethical Codes for politicians at the national level and for civil servants were 100% complete; for local

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<sup>58</sup> Section 279 and 280. As the Ombudsman's Office was one of the organizations constitutionally required to have a Code of Ethics, the announcement of the Ombudsman's Code of Ethics was declared on the 18<sup>th</sup> August 2008.

<sup>59</sup> The Constitution of Thailand 2550 B.E. (2007), Section 30 A code of ethics for the purpose of Section 279 shall be prepared and completed within one year as from the date of the promulgation of this Constitution.

<sup>60</sup> The Office of the Ombudsman, 'List of entities required to prepare code of ethic', retrieved 15 October 2013, <http://www.ombudsman.go.th/10/ethical/รายชื่อหน่วยงานที่ต้องทำประมวลจริยธรรม.pdf>.

<sup>61</sup> Nine core values prescribed by the Ombudsman:

1. Adherence to good conscience, honesty and accountability
2. Give priority to national over personal interests.
3. No conflict of interest
4. Adherence to righteous, fair and lawful conducts
5. Provide convenient, courteous and impartial service
6. Provide complete and accurate information to the public without distortion
7. Focus on work effectiveness, standardization, quality, transparency and accountability
8. Adherence to a democratic system under the constitutional monarchy
9. Adherence to an organization's professional ethics

politicians 80%; local government officials 99%; and other public employees 96%.<sup>62</sup> The Ombudsman's Office is developing a web link which provides the general public with access from the Ombudsman's website to the electronic database of the government agencies displaying their respective ethical codes. The task of the development of ethical standards by putting ethical codes in place is considered nearly accomplished and the Ombudsman's Office is now a central information centre for all Codes of Ethics.<sup>63</sup> In terms of producing an integrated set of ethical standards the Ombudsman has been effective.

### **Building ethical consciousness**

The drafters of the Constitution took the view that attempts to impose ethical standards are less likely to be successful unless a culture of ethical consciousness can be developed.<sup>64</sup> According to the 2009 Act, section 36 (2) the Ombudsman is also responsible for raising ethical consciousness. In this regard, the Ombudsman has set up a central ethical information centre, with the aim for it to operate as a knowledge-based unit for both Thai and international agencies in promoting the ethical behaviour of politicians and state officials. As the Ombudsman's Office has limited resources compared to other existing mechanisms, such as the Ministries of Education and Culture which are the main responsible agencies for moral promotion,<sup>65</sup> the Ombudsman's efforts have been focused on collaboration with other existing prominent organisations, activists and NGOs that are responsible for monitoring and promoting morals and ethics both in the public and private sectors. But given the shared nature of this endeavour, it is hard to ascertain to what extent the Ombudsman's contribution in raising awareness has had an impact.

### **Report on violation of the Code of Ethics**

As discussed above, the Ombudsman is designed to provide an external oversight of the standard of ethics of the political office holders and public officials to ensure that the various codes of ethics are enforced properly by the government agencies.

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<sup>62</sup> According to the Ombudsman Annual Report 2551 B.E. (2008), political office holders require eight Codes of Ethics, civil servants of all categories 42, and other kinds of public officials 112.

<sup>63</sup> The Ombudsman Annual Report 2555 B.E. (2012).

<sup>64</sup> Lertpaitoon, n. 17.

<sup>65</sup> Ombudsman Pravit Rattanapian, the Thai Ombudsman Office, *Twelve Years*, Bangkok, 2009, p. 54.



The Ombudsman is entrusted with power to investigate complaints about conduct which may constitute a breach of the Code of Ethics. However, the Ombudsman has taken the view that his role is to intervene when the enforcement measures and penalties are not carried out according to the respective Codes of Ethics. With regards to the codes of ethics, complaints are the sole source of work conducted by the ombudsman, as the law does not allow the Ombudsman to start investigation on his own when he thinks necessary.<sup>66</sup> Upon receiving a complaint, the Ombudsman's Office does not start an investigation right away but forwards it to the agency responsible for oversight of the ethics of the government officials, in order that they can investigate the matter and to give the respondent in the complaint the opportunity to explain matters to the Ombudsman. This practice was introduced in order that the Ombudsman would not be adversely affected by the increased workload and it was also considered appropriate given the view that ethical issues should primarily be dealt with internally by the responsible agency for each department, as they know best the subject of the complaints and where the real problems are.<sup>67</sup> It was also hoped that this practice could reduce the degree of conflict and prevent strained relationships with public agencies that could have potentially been brought about if the Ombudsman investigated all complaints received.

During the past five years, out of 216 petitions on ethics processed by the Ombudsman, only six have been acted on. Therefore, it can be seen that the workload of the office has not dramatically increased through this additional function been given to the office. The statistics also show that a large proportion of petitions are in the area of corruption, which is outside the Ombudsman's jurisdiction and these were therefore referred to the National Anti-Corruption Commission. Nevertheless, this additional function has caused difficulties for the Ombudsman in many aspects, in particular with regards to monitoring the alleged breach of the code of ethics of the parliamentarians. Recently, there has been an increased concern that the Ombudsman has become a means whereby political opponents can make

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<sup>66</sup> The Organic Act on Ombudsmen 2552 B.E. (2009), Section 37.

<sup>67</sup> Ombudsman Pravit Rattanapian, Seminar on the Ethical Standard, held by the Ombudsman Office, 16 November 2012, Bangkok, retrieved 12 May 2013, <http://www.manager.co.th/iBizchannel/ViewNews.aspx?NewsID=9550000138105>.

vexatious or mischievous allegations about each other.<sup>68</sup> In this regard, the decision making of the Ombudsman, although technically only a recommendation, is treated as setting in motion an execution process leading to punishment.<sup>69</sup> In view of the fact that the most extreme result is dismissal from office, commentators have pointed out that there are already some signs that political opponents have been tempted to use the code to discredit one another.<sup>70</sup> Research has been conducted to support such claims by finding that political tensions have directly led to the number of ethical investigated complaints towards holders of political positions jumping from only two in 2011 to 29 in 2012, and 16 in the first half of 2013.<sup>71</sup>

Since Prime Minister Yingluck took office in May 2011, the Ombudsman has conducted a series of ethical examinations against members of the government. At least three inquiries have been carried out against the Prime Minister herself and four against Ministers.<sup>72</sup> Even where the investigations do not find against government officials, this high-profile probing role has arguably changed the image of the Ombudsman from ‘the least talked about’ office which, at one point was even seen as ‘so insignificant as to be at risk of disbandment’, to an agency that people have come to regard as an institution which ‘stands up with claws and teeth’<sup>73</sup>. However, the question of whether the Ombudsman can do as much as some people hope and expect remains highly controversial. It should be noted that despite several investigations into the alleged misconduct of the Prime Minister and ministers, to date the Ombudsman has found no breach of the ethical code by these political actors. Instead, in a number of cases the Ombudsman stated after investigation that the alleged behaviour was not appropriate but did not amount to being unethical. He therefore recommended that the relevant procedure should be revised.

The unclear and indecisive approach of the Ombudsman has led to criticism concerning the Ombudsman’s effectiveness in overseeing ethics. For example, those

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<sup>68</sup> Chanikarn Poomhiran, Kanitha Thepajon, ‘Re: the power of the Ombudsman’, *Komchadluek*, 16 July 2013.

<sup>69</sup> *ibid.*

<sup>70</sup> *ibid.*; Chief Ombudsman Panit Nitithanprapas stated in a recent interview on the 14<sup>th</sup> anniversary of the Ombudsman Office on 11 April 2014 that the Ombudsman was not a political tool for harassment and demolition of political personalities, retrieved 27 September 2014, <http://mcot-web.mcot.net/fm1005/site/view?id=53479b4bbe047037348b457f#.VCkzifldUm0>.

<sup>71</sup> State Councillor Professor Soonton Maneesawat, an interview with the author on 12 March 2013, Bangkok.

<sup>72</sup> Minister of the Prime Minister of Office Nalinee Taveesin; Deputy Agriculture, Cooperatives Minister Natthawut Saikua; Minister of Foreign Affairs Surapong Towichukchaikul; and Deputy Prime Minister/Finance Minister Kittiratt Na Ranong.

<sup>73</sup> Ombudsman Pravit Ratanapian, *The Nation*, 17 October, 2012.

who viewed that the Prime Minister and the Foreign Affairs Minister had failed to comply with the ethical standards have publically expressed disappointment, claiming that the Ombudsman had not acted according to the power conferred on the office by the constitution. Further, they have urged the Ombudsman to take appropriate action in order to commence proceedings to remove the Prime Minister and the Foreign Affairs Minister from office.<sup>74</sup>

A member of the Constitution Drafting Committee and a proponent of the Ombudsman have expressed disappointment with his performance as follows:

The work of the Ombudsman today reflected that it did not fully exercise its powers. The performance did not meet the intent and the role that the Constitution prescribed which is to direct and monitor behavior and ethics of both state officials and political office holders. The role of the Ombudsman was diminished for example Pramote Chotimongkol former Chief Ombudsman laid down an internal regulation that resulted in a public agency to monitor the ethics on their own before the Ombudsman's intervention. Consequently, to date no agencies in particular the National Assembly has been able to inspect and prosecute its members on issues of ethics. In my view, the performance of the Ombudsman scored 5.5 out of 10.<sup>75</sup>

It should be stressed that the effectiveness of the Ombudsman in policing the enforcement of ethical codes could not be measured alone by the number of substantiated allegations that the Ombudsman brought to the National Assembly. This is because the allegations may be unfounded. In addition, other than the possibility that the investigated politicians did not behave unethically, there are at least two possible explanations for the fact that the Ombudsman did not substantiate the alleged unethical misconduct of the Prime Minister and Ministers: the first is attributed to the fact that ethics are abstract and consist of broad principles which make it difficult for the Ombudsman to apply to a particular case.<sup>76</sup> The other is that the Ombudsman remained reluctant to become involved in controversial investigations, so as to preserve its ability to work closely with the executive in addressing complaints and righting administrative wrongs.

Nevertheless, the Ombudsman's relationship with the Government has come under some strain arising from the above ethical investigations which are seen by a

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<sup>74</sup> 'Yingluck faces Ombudsman's Probe', *The Manager*, 12 November 2012.

<sup>75</sup> 'The Ombudsman's Mandate', *Konchadluek*, 19 July 2013.

<sup>76</sup> Kanin Boonsuwan, Spokesman and Member of the Drafting Committee for the 1997 Constitution, *Komchadluek*, 12 February 2012,

number of government members as being politicised and biased.<sup>77</sup> It has been argued that there were several cases where the unethical behaviour of the members of opposition party was apparent but the Ombudsman failed to examine and take action.<sup>78</sup> As a result, the Ombudsman has been seen as an adversary by many leading members of government. Such discontent with the Ombudsman has even directly led to a proposal by a leading member of the government party in the House of Representatives to disband the Office of the Ombudsman.<sup>79</sup>

The point to be made here is that ethical code monitoring function has drawn the Office into controversial issues and as such resulted in problems for the Ombudsman in terms of decisions not being accepted by parties to a dispute, a danger which becomes especially evident in the area of ethics given its abstract nature which makes the Ombudsman's decisions more likely to be contested.

In the meantime, Ombudsman Sriracha Charoenpanich earlier stated that he considered that the Ombudsman's role in reporting ethical violations is in conflict with the interests of good working relationships with the government, saying that he accepted this task with much reluctance because it requires him to clash with bureaucrats and politicians.<sup>80</sup> He recently revealed the difficulties the Ombudsman was facing in coordinating his office's work with public organisations and political parties. According to him, the Ombudsman has organised a number of ethical training sessions for holders of political positions and public officials, but in the end the Ombudsman could train only one party (the Democrat Party), which was the opposition party. This is because the other political parties did not accept the invitation. In addition, while there were 20 public institutions which sent representatives to participate in the training, only two of these institutions proceed in accordance with the training. This tiny fraction of possible trainees suggests that the Ombudsman has not been successful in this ethics training. This provides further evidence that the Ombudsman's ability to function effectively in raising public conscious of the ethical standards is adversely effected from the strained relationship the role creates with the parliamentarians.

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<sup>77</sup> *ibid.*

<sup>78</sup> Former Senator Ruangkrai Leekitwattana, *Post Today*, 11 March 2012.

<sup>79</sup> Sophon Petchsawan, Chairman of the House of Representative Sub-committee on the Constitutional Amendment, *Dailynews*, 7 January 2013.

<sup>80</sup> Ombudsman Sriracha Charoenpanich, an interview with the author on 3 March 2013, at the Ombudsman Office, Bangkok.

It is difficult to make any real assessment of the effectiveness of the Ombudsman's performance in the area of ethical standard enforcement, as this requires further study. It is also probably too early to determine the impact of the Ombudsman on the ethical climate. However, from the discussion above, at this stage what can be said is that the Ombudsman has faced difficulties in discharging this function and the prevailing view has not been positive regarding the Ombudsman's performance. Some scholars' works have even suggested that ethical issues are more appropriately and effectively resolved through other kinds of institution.<sup>81</sup>

### 7.3 Conclusion

The chapter demonstrates that the Office of Ombudsman in Thailand can protect the rights of the citizen by providing a link and an alternative means of gaining access to the Constitutional Court in the event of a problem on the constitutionality of provisions of laws. This role is an extension to the Ombudsman's core role of protecting citizens' rights that may be adversely affected by the exercise of public power.

However, the achievement of the other two additional functions: monitoring and evaluating government agencies implementation of the provisions of the Constitution; and monitoring the enforcement of codes of ethics for political office holders and state officials are not well manifested by the evidence currently available. The Office has not been seen as making a significant concrete contribution towards the implementation of the Constitution by public agencies. The Ombudsman's few investigations into ethical complaints against political office holders have not revealed any serious cases of ethical violation and no misconduct has been reported. It should not, therefore, come as a surprise that the institution is regarded by some as not being able to meet the expectations made of it by the Constitution in this respect.

While it may be too early to assess the achievement of the Ombudsman in performing the two new roles assigned by the 2007 Constitution, it is obvious that the Thai Ombudsman Office is facing difficulties arising in performing such roles. First, there is an issue of lack of, or perceived lack of, the expertise required to

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<sup>81</sup> Professor Bunjerd Singkaneti, an interview with the author on 10 March 2013 at the National Institute of Development Administration (NIDA), Bangkok; State Councillor Professor Soonton Maneesawat, an interview with the author on 12 March 2013, Bangkok.

perform constitutional review and analysis. Monitoring and evaluating the implementation of the Constitution is labour intensive and requires specific expertise for which the Ombudsman is not sufficiently equipped. Without proper resources and expertise such challenges makes it considerably more difficult for a young institution, such as the Thai Ombudsman, to succeed. Evaluating the implementation of the Constitution also requires the Ombudsman to deal with the questions that are more appropriately answered by the political branches. The other issue is that the investigation and reporting of ethical violations has led the Ombudsman into conflict with the executive. In the Thai context, the Ombudsman was inevitably drawn into political disputes. A lack of cooperation from public officials and political parties has also been evident. Because the Ombudsman effectively operates through persuasiveness, these difficulties could affect the overall effectiveness of the Office.

Overall, it would also seem that the perception that the Ombudsman's role as the protector of citizens' rights from administrative abuses, thus far, has not been satisfactorily performed, is a perception that cannot be reversed by transforming the Ombudsman's institution into a multifunctional office. The mandate is broad and probably too diversified, adding for the potential for the office to be burdened by a lack of specific expertise and clarity in its image. On the other hand, these additional roles are of a highly political nature which are beyond the Ombudsman's territory and may be incompatible with the Ombudsman's principle. In addition, the fact that the roles with regard to the mandates of both ethics and the Constitutional implementation relate only indirectly to citizens would likely affect the perception of the Ombudsman as an office for the people. Worse still, in these two mandates the Ombudsman only serves as an extra layer to the existing mechanism, making it difficult for the Ombudsman to make a significant and distinctive contribution or add much by way of meaningful value. The problem of performance together with lack of effective accountability (will be discussed in the next chapter) in place could have attributed to the diminished credibility of the Ombudsman, which ultimately led to the question of the legitimacy of the Ombudsman. Attempts to abolish the Ombudsman have also been evident.

The chapter adds emphasis to the fact that, even with regard to its primary function, an ombudsman needs to build up its public credibility and confidence gradually over a period of time, which in turn might provide the impetus for further growth and influence of the Office. The forthright imposition of roles, as adopted in

Thailand, rather than an evolution on its own terms, may have led to difficulties in the operation of the office and undermined its ability to operate optimally. In this regard, the study now turns to the working arrangements and statutory support which is considered essential for any ombudsman scheme to be effective in delivering its goals. Therefore in the next chapter the appropriateness of the institutional design and the practical output of the Thai Ombudsman are explored. In Chapter 9, the question as to whether collectively the operational weakness of the Thai Ombudsman suggests that it is experiencing the difficulties identified in Chapter 4 will be further explored.

## **Chapter 8**

### **Analysis of the institutional design of the Thai Ombudsman**

As already discussed in Chapter 3, there are essential features of standard ombudsman schemes that it is widely accepted should be adopted in the design of an ombudsman scheme, notwithstanding the variations in the actual implementation of the concept in the countries that have adopted it. In Chapter 3, it was claimed that for an institution to function effectively as an ombudsman, it should ideally possess the following essential or constitutive characteristics: (1) independence; (2) impartiality; (3) effective powers; (4) fairness; (5) access and public awareness (see Chapter 6); and (6) accountability. The argument there was presented, and pursued further in Chapter 4, that ombudsman schemes that are inappropriately constructed are more likely to experience difficulties in the implementation of their roles than those built according to the classical design of the ombudsman.

In this part of the thesis, Chapters 5 and 6 identified that the Thai Ombudsman has been created to perform the ombudsman's traditional function of resolving complaints about maladministration, and the additional functions that have been subsequently assigned to it are not meant to change this primary function. The question raised earlier regarding its ability in Thailand to deliver on all of the various roles conferred on it should now be addressed by considering the relevant provisions of the 2007 Constitution and the 2009 Act in light of these characteristics. This Chapter also examines the implementation of these provisions in practice and aims to examine if there are any defects in the design that may hamper or limit the capacity of the Thai Ombudsman in the performance of its functions. Therefore, included in the discussion in this section are facts and views of leading critics.

For this purpose, this chapter therefore is divided into six sections, section one to five address five essential features in turn ('Accessibility and Public awareness' has already been discussed in chapter 6) using criteria developed in chapter 3. Section six concludes the chapter.



## 8.1 Independence

The conclusion of Chapter 3 was that best practice in ombudsman design necessitated that an ombudsman is constructed in a manner that guarantees its independence. The underlying rationale for independence in this context is that an ombudsman has to be capable of conducting fair and impartial investigations, credible to both complainants and the authorities that may be under the ombudsman's review. For an examination of the Thai Ombudsman the following key issues were identified in Chapter 3 as important aspects of establishing independence.

- Constitutional protection
- Institutional and functional independence
- Funding and operational autonomy
- Remuneration, security of tenure and removal of office

In order to verify the safeguarding of these factors various tests of independence could be envisaged.

### *Constitutional protection*

Probably the best form of constitutional protection comes in the form of explicit recognition of the ombudsman's status in the constitution itself. Such protection is further strengthened where there is some detail provided in the constitution as to the ombudsman's organisation and powers. The veracity of such protection can be tested by the following question:

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|---|
| <ul style="list-style-type: none"><li>• <i>Is the Ombudsman's Office created by the Constitution?</i></li></ul> |
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The 2007 Constitution recognises the Thai Ombudsman as an independent constitutional organisation by entrenching it under CHAPTER XI entitled 'Constitutional Organisation Part 1 Independent Organisations'. This is a bespoke section of the constitution dedicated to establishing and protecting the status of accountability institutions, including the Ombudsman. Section 242 sets up the appointment procedure as well as its selection process and tenure,<sup>1</sup> while Section 244 of the Constitution then sets out the Ombudsman's powers and mandate.<sup>2</sup>

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<sup>1</sup> Section 242 The ombudsmen shall not be more than three in number and shall be appointed by the King with the advice of the Senate from persons recognized and respected by the public, with knowledge and experience in the administration of State affairs, enterprises, or activities of common interest for the public and with apparent integrity. Appointed ombudsmen shall hold a meeting to elect among from themselves a president and shall disclose the result of the election to the president of the Senate. The president of the Senate shall countersign the Royal Command appointing the ombudsmen.

By integrating the institution into the written constitution – the supreme law of the land - the effect of these provisions is significant in terms of the permanence of the institution. As with many written constitutions, constitutional amendment in Thailand is subject to a special procedure that is more stringent than that required of ordinary legislation to prevent frequent amendment. The core features of the Ombudsman contained within the Constitution are, therefore, safeguarded against change imposed by governments that only retain partial support of the legislature.

The amendment of the Constitution requires an approval by votes of greater than one-half of the *total number of the existing* members of both Houses.<sup>3</sup> This process is more stringent compared to the ordinary legislative procedure, for which only a simple majority of *present* MPs<sup>4</sup> is required and which does not need a joint meeting of both Houses, as is the case for constitutional amendment. By stipulating that constitutional amendments must be supported by a majority of the entire membership rather than the present or voting members, the result is that amendments require the support of at least 316 votes out of total 630 (480 in the House of Representatives and 150 in the Senate). Given that the opposition represents nearly half of the votes in the House of the Representative, and that a positive vote of at least 76 members of the Senate is required in favor of the proposition for amendment,

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The qualifications, prohibitions, selection, and election regarding the ombudsmen shall be in accordance with the organic law on ombudsmen. The ombudsmen shall hold office for a term of six years from the date of their appointment by the King and shall serve for only one term.

<sup>2</sup> Section 244 The ombudsmen have the powers and duties as follows: 1. to consider and inquire into a complaint for fact-finding in the following cases: a. failure to perform in compliance with the law or performance beyond the powers and duties as provided by the law for a government official, an official, or an employee of a State agency, State enterprise, or local government organization; b. the performance of, or negligence in the performance of, the duties of a government official or an official or employee of a State agency, State enterprise, or local government organization, which unjustly causes injury to the complainant or the public, regardless of whether such an act is lawful or not; c. examination of negligence in the performance of duties or the unlawful performance of duties by organizations under the Constitution and judicial bodies; d. other cases as provided by the law; 2. to take action in connection with the moral conduct of persons holding political positions and State officials in accordance with the provisions of Section 279 para three and Section 280; 3. to prepare reports for and submit opinions and suggestions to the National Assembly. Such reports shall be published in the Government Gazette and made available to the general public; 4. to report results of investigation and performance as well as observations to the Cabinet, House of Representatives, and Senate annually and the said reports shall be published in the Government Gazette. Actions under (1) a (b) and (c) shall be taken by the ombudsmen after having received complaints from injured persons. The ombudsmen may decide to launch an investigation into any matter that is deemed to be detrimental to the general public or the public interest.

<sup>3</sup> The Constitution of Thailand 2550 B.E. (2007), Section 291.

<sup>4</sup> Rule and Procedure of the Meeting of the House of Representatives, Sections 71-78 and 131.

this provision does mean that it is not easy for a majority government to make changes to the constitution without first securing wider political support.<sup>5</sup>

Further, the Constitution also authorised the legislative body to enact an organic law to amplify the Ombudsman's powers and responsibilities.<sup>6</sup> This remains a robust arrangement because the legislature cannot enact a law that deviates from that which has been provided for in the Constitution. Moreover, an organic act has a higher legal status than ordinary legislation, though lower than the constitution and its legislative process is designed to be more difficult.<sup>7</sup> Such processes are therefore designed to serve as a deterrent against arbitrary amendments, and should offer a better guarantee than ordinary acts (provided that the constitution itself remains protected against politically or militarily instigated overhaul).<sup>8</sup> For the Thai Ombudsman, the constitution has duly been implemented in the form of the Organic Act on Ombudsmen B.E 2552 (2009).<sup>9</sup>

The relatively secure constitutional position of the Ombudsman is illustrated by the Ombudsman's ability so far to resist political moves to get rid of the institution. During 2012, the Ombudsman conducted several investigations against the Prime-Minister, Ministers and members of parliament in cases involving alleged violations of ethics codes (as discussed in chapter 7). Following such investigations, the Ombudsman office was exposed to political attacks as never before. Of most concern were the attempts to abolish the Ombudsman in January 2013 by Deputy Prime Minister Chalerm Ubamrung and the proposal by the House of Representative ad-hoc committee<sup>10</sup> for studying constitutional amendments, which resolved to

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<sup>5</sup> This is not to argue that the Thai Constitution provides stronger protections than those in other countries when it comes to amendment, especially where stronger majority is required while in the case of Thailand the only added strength is that many more members must turn up to vote to reach the required threshold. But this is only a real barrier if ordinarily a sizeable chunk of members do not turn up.

<sup>6</sup> The Constitution of Thailand 2550 B.E. (2007), Section 139.

<sup>7</sup> The Constitution of Thailand 2550 B.E. (2007), Section 240 stipulates that the legislative process for an Organic Act requires more than half of the existing MPs of both houses, while an ordinary act only requires simple majority of the attended MPs.

<sup>8</sup> Another reason for introducing an Organic Act is to prevent the Thai Constitution from becoming too long, see Somkit Lertphaitoon, *Organic Act* (พระราชบัญญัติประกอบรัฐธรรมนูญ), Thai Research Fund, Bangkok, 1993.

<sup>9</sup> In this work, it is referred to as the 2009 Act

<sup>10</sup> This ad-hoc committee chaired by Sophon Petchsawang, former Vice President of the House of Representative, is appointed by the House of Representative under the Constitution Section 135 in order to perform any act, inquire into or study any matter within the powers and duties of the House and report its findings to the House.

dissolve the Ombudsman.<sup>11</sup> Both cited the reasoning that the parallel existence of the Administrative Court and the Ombudsman made the Ombudsman institution unnecessary. The proposal is under deliberation, but because of the difficulty of making Constitutional amendments there was not any conclusion on the issue, which has probably been closed now following the 2014 military coup. The Ombudsman's place in the constitution cannot be guaranteed in perpetuity, but the added protection provided by the constitution at least makes the danger a more long term one.

As well as protecting the Ombudsman, its constitutional basis also helps to create a degree of prestige for the office, and lends it credibility in terms of the public's perception. In Thailand the Ombudsman is appointed by the King with the advice of the Senate.<sup>12</sup> The ombudsman's powers are derived directly from the Constitution and its status is parallel with and separate from the powers of the executive and legislative branch, the office is presented as a body of some importance. The status of the Thai Ombudsman, therefore, strongly conforms to standard expectations as to the permanence of an ombudsman scheme. Indeed, it could be argued that embedding the Thai Ombudsman in the constitution makes the office more secure than many other equivalent schemes around the world which do not necessarily have constitutional protection.

### ***Institutional independence and functional independence***

The arrangement for independence must allow the Ombudsman to be visibly separate from the public bodies which are subject to the Ombudsman's investigation. Furthermore, the ombudsman should be able to carry out their functions independently without external interference or imposed objectives and influence from the government and parliament. In Chapter 3 the following questions were identified as indicative of the lines of inquiry necessary to establish the functional independence of the ombudsman.

- *Is the Ombudsman subject to control by the executive/governmental organs or state authorities?*
- *Does the constitution or the enabling legislation define the method of appointment and state clearly the term of appointment for the Ombudsman?*

<sup>11</sup> 'Dissolve independent organisations', *Naewna*, 12 January 2013, retrieved 28 September 2013, <http://www.naewna.com/politic/columnist/4888>; 'Dissolve Ombudsman', *Dailynews*, 7 January 2013, retrieved 28 September 2013, <http://www.dailynews.co.th/politics/176678>.

<sup>12</sup> The Constitution of Thailand 2550 B.E. (2007), Section 242.

- *Does the Ombudsman report to the legislature directly on the result of its operation or any specific matters resulting from an investigation?*
- *Is the Ombudsman free to select which complaints to pursue and methods for pursuing them?*
- *Is the Ombudsman free to make recommendation?*

The 2007 Constitution has clearly separated the Ombudsman from both the executive and legislative branch by specifically positioning the Ombudsman Office under CHAPTER XI entitled ‘Constitutional Organisation Part 1 Independent Organisations’.

This arrangement has catered for the Ombudsman to operate as an independent body and also was a presentational significance which reinforces the perception of its independence. Under this structure the Ombudsman is no longer a parliamentary ombudsman, as it was in the previous constitution. Accordingly, the title of the Ombudsman has been changed from the ‘Parliamentary Ombudsman’ to ‘the Ombudsman’ to reflect the new status.

As for functional independence, the 2009 Act Section 28 and Section 29 equip it with full discretion in determining the nature and extent of any inquiry or investigation; whether the matter complained of falls within his or her jurisdiction and, if answered in the positive, whether to accept complaints, continue or discontinue investigation.<sup>13</sup> Further, Section 15 of the 2009 Act gives the Ombudsman mandate to issue its own regulation on submission, admission and investigation of complaint.<sup>14</sup> These powers are additional essential tools to secure the

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<sup>13</sup> Section 29 The Ombudsmen may reject or cease the complaint related to:

- (1) corruption in official service;
- (2) the matter in which the complainant is not an interested person and the consideration thereon is not beneficial to the public;
- (3) the matter submitted after the lapse of two years as from the date the complainant knows or ought to know the cause of the complaint and the consideration thereon is not beneficial to the public;
- (4) the matter in which the appropriate remedy or compensation for grief or unfairness of the complainant has been given and the consideration thereon is not beneficial to the public;
- (5) the matter in which the complainant fails to give oral statement or present evidence or fails to do any act as requested writing by the Ombudsmen within specified period and without reasonable grounds;
- (6) the matter in which the complainant has deceased without heir to continue the complaint and the consideration thereon is not beneficial to the public;
- (7) the matter in which the Ombudsmen has had conclusion, except where the new evidence or fact has been found and the consideration result may be changed on account thereof.

<sup>14</sup> Regulation on Submission, Admission and Investigation of Complaints, 2012, Royal Gazette 31 January 2012.

Section 28 The complaint decided by the Ombudsmen of having the

Ombudsman's functional independence, as they warrant a self-determined method of investigation and any other duty.<sup>15</sup>

The above discussion shows that the legislative arrangements for the Thai Ombudsman meets the ombudsman's accepted norms of independence. But the real test is whether the ombudsman has been able to use its position freely. In practice, there is no evidence that members of parliament or government have tried to influence the decision-making of the Ombudsman or even direct his activities to certain matters. There is no report that the work of the Ombudsman is under pressure. This analysis is supported by an interview staged with the Ombudsmen by the author, in which the Ombudsmen indicated that they enjoyed full independence and had experienced no unwarranted pressure in the carrying out of their duties or operations.<sup>16</sup> The findings and recommendations issued in public reports have not been subjected to censor or delay by the executive or the bodies which it oversees. The Ombudsman has the final say on the contents of the report.

### ***Funding and operational autonomy***

It is essential for the independence of the Ombudsman that the office is equipped with a budget that is sufficient to carry out the functions prescribed to it, as set out by the law. If this were not the case, the ombudsman would be incapable of carrying out the necessary investigations – a situation that may result in a lack of independence. In particular, financial and administrative reliance on the executive

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following characteristics shall be rejected or ceased:

- (1) being policy of the Council of Ministers as stated to the National Assembly, except where the implementation in accordance with such policy being the matter under Section 13 (1) or (2);
- (2) being the matter that having been filed to the Court or the matter that the Court has final judgment or order thereon;
- (3) not being the matters under Section 13 (1) and (2);
- (1) (4) being the matter relating to personnel administration or disciplinary action of government official, official or employee of a government agency, State agency, State enterprise or local government organisation, except the matter under Section 13 (2);
- (4) the complainant fails to comply with Section 24.

<sup>15</sup> Section 15 (5) to issue regulations determining rules and procedures on receiving of complaints for consideration and the regulations on inquiry;

- (5) to issue regulations determining rules and procedures for the conduct of proceedings in relation to ethics of a person holding political position and State officials under Section 37 and Section 39;
- (6) to issue regulation determining rule on expenditure, allowances and travel expenses of oral evidence and the performance of duty of the officer;
- (7) to issue any regulation or carry out any other duty which is prescribed by this Organic Act or other laws to be a duty of the Ombudsmen.

<sup>16</sup> Chief Ombudsman Panit Nitithanprapas, an interview with the author on 15 March 2013 at the Thai Ombudsman Office, Bangkok; Ombudsman Sriracha Charoenpanich, an interview with the author on 3 March 2013, at the Ombudsman Office, Bangkok.

branch can make the ombudsman vulnerable to budget cuts, which would weaken its independence. Key questions to consider in this regard include:

- *Does the office have its funds allocated directly from the legislature and is its budget funded at a level sufficient to carry out the functions of the office?*
- *Does the Ombudsman have the sole power to run the office, appoint and remove staff?*

On this issue, the 2007 Constitution resolves that constitutionally independent organisations, including the Ombudsman, should receive adequate funding in keeping with good governance and easy accessibility, and that the matter of funding should not militate against the institution's independence. Therefore, Section 168 of the 2007 Constitution provides specific protection for constitutionally independent organisations, including the Ombudsman, by allowing direct submission of a motion to the committee responsible for considering annual Appropriation Bill instead of having to go through the Budget Bureau like other public offices. The special procedure applies if the Ombudsman is of the opinion that the budget appropriated is not sufficient.<sup>17</sup>

This arrangement means that the Ombudsman's budget is approved by parliament, not the executive, and that the Ombudsman does not have to undergo annual budget negotiations with the government. As a result, the Ombudsman's budget is largely protected from the direct control of the executive. The Ombudsman is not under the direct risk of being placed under budget restrictions by the executive to an extent that undermines its efficient operation. Therefore, the constitutional arrangement for securing independence in terms of the budgetary process for the Thai Ombudsman exceeds the standard ombudsman practice.

In terms of operational autonomy, Section 242 of the 2007 Constitution ensures the Ombudsman has full operational autonomy by stipulating that the Office of the Ombudsman is an independent agency with autonomy in personnel administration, budgeting and other activities.<sup>18</sup>

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<sup>17</sup> Section 168 The State shall provide adequate budgetary appropriations for the independent operation of the National Assembly, the Constitutional Court, Courts of Justice, the Administrative Courts and constitutional organs. In considering budgetary appropriations of the National Assembly, the Courts and agencies under paragraph eight, such agency may, if it is of the opinion that the budgetary appropriation for it is insufficient, directly submit a motion to the committee.

<sup>18</sup> This constitutional provision is articulated by the Office of the Ombudsman Act 2552 B.E. (2009).

There is also no evidence that the Ombudsman has experienced operational difficulties or has had excessive budget constraints placed upon it by the executive in an attempt to weaken its capability. From its establishment, the Ombudsman has received an annual budget in the range of 40-60 million baht. This level has changed since 2007, after the promulgation of the present Constitution, until now the Office has received an annual budget between 180-230 million baht.<sup>19</sup> This represents at least a five times increase in budget allocation compared to the amount the Office received during the previous Constitution. Such a huge increase in budget allocation, therefore, is evidently a response to the expanded responsibilities that have been conferred on the ombudsman following the revision of the constitution.

It should be noted that to date the Ombudsman's funding has been on a par with other constitutional independent organisations of similar size and mandate, such as the National Human Rights Commission (i.e. in 2014 the Ombudsman received 212.8 million baht while the National Human Rights Commission 198.5 baht<sup>20</sup>). During the first two fiscal years of operation, the Office of the Ombudsman had a budget surplus by the end of the year. In 2006–2007, it was slightly over budget. This suggests that the budget is more or less sufficient.

### ***Remuneration, security of tenure, immunity and removal from office***

In order to protect the ombudsman's independence, the enabling legislation of the Ombudsman should guarantee the personal security of the Ombudsman by prescribing for such things as salary, term of tenure, and provision for immunity. In relation to this goal the following key questions are pursued here.

- *Does the ombudsman have a fixed and long term of office?*
- *Does the ombudsman have a high and fixed salary?*
- *Is the Ombudsman provided with immunity from liability and criminal prosecution for acts performed under the law?*

The Thai Ombudsman is provided with several measures to protect its personal security. The 2009 Act prescribes that the salary, position allowance and other benefits of the Thai Ombudsman is prescribed by law.<sup>21</sup> As such it cannot be

<sup>19</sup> The Thai Ombudsman's Annual Reports.

<sup>20</sup> The Annual Budget Act for the Fiscal Year 2557 B.E. (2014).

<sup>21</sup> The Organic Act on Ombudsmen 2552 B.E. (2009), Section 22.



adjusted, raised or reduced by the government and therefore the Ombudsman is not controlled by the government. This measure protects the Ombudsman from being indirectly punished or discouraged or encouraged in the carrying out of his duties or from any repercussions if the Ombudsman publishes reports that cause political difficulties or makes inconvenient recommendations. As to the salary of an Ombudsman, since the Ombudsman is regarded as a high prestigious position, the remuneration is equated with judges of supreme courts.

To date there has never been an attempt to reduce the Ombudsman's salary. Indeed, recently a proposal has been put forward to increase the salary of the office holders of Independent Constitutional agencies, including the Ombudsman, to reflect the rise in living costs.<sup>22</sup>

The Ombudsman also enjoys long office term of six years.<sup>23</sup> This long, fixed term gives the Ombudsman protection from removal by political reason or inappropriate pressure being placed upon him by the government. Unless dismissed by Parliament for incapacity or serious ethical misconduct, the Thai Ombudsman serves for six years. The purpose for setting the term of six years is to make it overlap with the 4-year term of a member of the National Assembly. This fits the requirement that the term of the Ombudsman is longer than the term of the legislative body which is responsible, if necessary, for removing the Ombudsman.

The provision for the Ombudsman to serve for only one term is intended to secure independence, so that the Ombudsman can act without having to speculate on the possibility of serving for another term. It also prevents the accumulation of power and monopoly of position. The tenure for six years is appropriate, as it is not too short for the Ombudsman to effectively implement his plan. And though it can be argued that many ombudsmen around the world are allowed to hold the position for longer than six years, the risk of holding the position for too long is that the Ombudsman can become complacent. In this respect, the provisions are in line with standard ombudsman legislation and thinking, as argued in Chapter 3.

Apart from completion of his term of office, the Thai Ombudsman can be removed from office only on the grounds specified by law, e.g. incapacity, or gross

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<sup>22</sup> *Bangkok Biznews*, 18 June 2013.

<sup>23</sup> The Constitution of Thailand 2550 B.E. (2007), Section 242.

misconduct.<sup>24</sup> The criteria and process for dismissal on grounds of misconduct or an impeachment are set out in the Constitution sections 270-274.<sup>25</sup> The removal requires a resolution of not less than three-fifths of the total number of the existing members of the Senate, which is larger than an ordinary majority.

While it is common practice to have a majority parliamentary confirmation for the removal of the Ombudsman, the arrangement in Thailand is to vest this power in the Senate for fear of political interference. Under the Thai Constitution, the Senate is designed to be politically neutral.<sup>26</sup> The same rationale applies to the appointment process (discussed below under ‘Impartiality’). This arrangement may deviate from common practice but it effectively provides strong protection for the Ombudsman from inappropriate pressure being placed upon him or her by the government. Taking into account the specifics of the Thai context, this legislative scheme therefore is in line with standard ombudsman legislation in protecting the ombudsman’s independence. (But there is an issue with accountability, this point will be returned to under ‘Accountability’ below.)

Despite the legal guarantees for the independence discussed above, however, it is worth asking: if the government or other constitutional bodies were to attempt to interfere with the Ombudsman’s mandate and power, what defence or support would the Ombudsman have to protect himself? In the worst case scenario, the Ombudsman

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<sup>24</sup> The Organic Act on Ombudsmen 2552 B.E. (2009), Section 9 Apart from vacating office at the end of the term, the Ombudsman vacates office upon:

- (1) death;
- (2) being seventy years of age;
- (3) resignation;
- (4) being disqualified or being under any of the prohibitions under Section 8;
- (5) having been sentenced by a judgment to a term of imprisonment irrespective of whether the case becomes final or the sentence has been suspended, except for an offence committed through negligence, a petty offence or defamation and such case has not become final or the sentence has been suspended;
- (6) having been ordered by a judgment or an order of the Court that his assets shall vest in the State on the ground of unusual wealth or an unusual increase of assets;
- (7) being under any of the prohibitions under Section 207 (1), (2), (3) and (4) of the Constitution;
- (8) being removed from office by the resolution of the Senate.

<sup>25</sup> Under the Constitution Section 271 in order to request removal of the Ombudsman by the resolution of the Senate, it requires MPs of not less than one-fourth of the total number of the existing members of the House. The said request shall clearly state circumstances in which such persons have allegedly committed the act or not less than twenty thousand in number of the person having the right to vote have the right to lodge a complaint in order to request for a removal of persons under Section 270 from office in accordance with Section 164.

<sup>26</sup> Out of the 150 Senators, 76 are directly elected from, the remaining 73 members are to be selected by a Senators Selection Committee; see Paul Chambers, ‘Superfluous, Mischievous or Emancipating? Thailand’s Evolving Senate Today’, *Journal of Current Southeast Asian Affairs*, 28, 3, 2009, p. 21; Michael H. Nelson, ‘Debating the Institutional Shape of Thailand’s Senate, 1990 to 2007’, pp.1-5, retrieved 12 November 2012, < <http://wu-th.academia.edu/MichaelHNelson>>.

could seek judicial protection. Section 214 of the Constitution provides resolution for the conflict of jurisdiction between the constitutional organs. Section 214 stipulates:

In the case where there occurs a conflict as to the powers and duties between at least two organs, being the National Assembly, the Council of Ministers or constitutional organs that are not Courts, the President of the National Assembly, the Prime Minister or such organ shall submit a matter together with the opinion thereon to the Constitutional Court for a decision.

This allows for strong constitutional protection for the Ombudsman, as the decision of the Constitutional Court shall be deemed final and binding on the National Assembly, Council of Ministers, Courts and other State organs.<sup>27</sup>

The security of the post of Ombudsman is protected further by immunity granted for acts performed under the law. In this regard, the 2009 Act, Section 18 provides that the Ombudsman shall not be liable to both civil and criminal liabilities if he exercises the powers and duties under this 2009 Act in good faith. Since establishment, no Ombudsman in Thailand has been prosecuted in court with regard to the discharge of his power and duties. So long as judicial independence is constitutionally secured, the Thai Ombudsman is appropriately protected. Where there are minor deviations from the standard institutional design, they are justified by the specific Thai context.

### ***Conclusion***

In terms of independence the legislative framework and the practice of the Thai Ombudsman meet the standard expectations of institutional design in the ombudsman community for all the aspects tested here. The conclusion in this regard, therefore, is that the Thai Ombudsman enjoys a high degree of independence. Nor is there any available evidence of unwarranted pressure being placed on the Ombudsman's independence. All the evidence would suggest that, in terms of securing independence, the solutions included in the 2007 Constitution were effective. So long as the Thai system of government remains stable, the Ombudsman's position looks secure.

The biggest danger to the Ombudsman's independence, however, comes from the potential for the Thai constitution to be exposed to radical overhaul following any future military coup. This indeed is exactly what happened during 2014, although

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<sup>27</sup> The Constitution of Thailand 2550 B.E. (2007), Section 216.

interestingly the role of the Ombudsman has remained relatively untouched by the events of the coup. It is not the place of this thesis to discuss the temporary interim arrangements put in place by the military. Instead, it is submitted here, that upon the redrafting of the constitution, the 2007 represents a good model for the Ombudsman in terms of institutional design with regard to independence. However, it is also worth pointing out that the Thai Ombudsman is not a parliamentary ombudsman and of all the features of the Thai Ombudsman, none is more important nor represents such a radical departure from traditional ombudsman institutions as the Ombudsman's relationship to the legislature. This point will be returned in Chapter 9.

## 8.2 Impartiality

The need for demonstrable impartiality in the work of the individual ombudsman and for the office as a whole is imperative in order to safeguard public trust and reduce the danger that the work of the office is undermined by the presence of any political partisanship. The following questions are explored to evaluate if the Thai Ombudsman's scheme fosters the Ombudsman's impartiality.

- *Are personal qualifications imposed to select an Ombudsman who is widely respected?*
- *Does the appointment process help to ensure that the person selected is widely viewed as fair and impartial?*
- *Are reasons for dismissal of the Ombudsman specified by law?*
- *Does the removal of the Ombudsman require a super majority?*
- *Is the ombudsman prohibited from simultaneously holding public office or being actively involved in political activities?*

In Thailand, impartiality is emphasised as the essence of all constitutional watchdogs, including the Ombudsman.<sup>28</sup> This is important as the enduring support for the Ombudsman and the willingness to accept his recommendation depends on a general perception of his impartiality. Arguably this is an issue in Thailand, due to its

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<sup>28</sup> Borwornsak Uwanno, *the Spirit of the Constitution*, 10 October 2011, p. 52, retrieved 3 October 2013, [http://library2.parliament.go.th/giventake/content\\_cons40-50/cons2540/cons40-intention2.pdf](http://library2.parliament.go.th/giventake/content_cons40-50/cons2540/cons40-intention2.pdf).

selection process the Thai Ombudsman is not perceived by all as impartial, despite no one questioning his independence.<sup>29</sup>

The best practice to secure impartiality is to appoint an ombudsman who is a widely respected individual and to have a selection process that is seen by diverse political groups as fair and impartial. This matter is covered in the 2007 Constitution by Section 242 which requires the Ombudsman to be:

‘...the persons recognised and respected by the public, with knowledge and experience in the administration of the State affairs, enterprises or activities of common interest of the public and with apparent integrity.’

This constitutional provision seeks to find a well-respected person with knowledge, experience, high social standing and ability to be qualified for the position but does not explicitly address the issue of impartiality. The 2009 Act Section 8 amplifies this constitutional principle by covering a broad range of matters which addresses the impartiality as well as other qualification.<sup>30</sup> The impartiality

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<sup>29</sup> Kamchai Jonchakphan, in ‘Re: the power of the Ombudsman, (in Thai)’, *Komchadluek*, 16 July 2013; State Councillor Professor Soonton Maneesawat, an interview with the author on 12 March 2013, Bangkok; Kamon Suksomboon, an interview with the author on 29 March 2013 at the Government House, Bangkok.

<sup>30</sup> Section 8. The Ombudsman shall have qualifications and shall not be under any of the prohibitions as follows:

- (1) being of Thai nationality by birth;
- (2) being of not less than forty five years of age on the application date;
- (3) having graduated with not lower than a Bachelor degree or its equivalent;
- (4) not having been the Ombudsman or Parliamentary Ombudsman;
- (5) not being a disfranchised person;
- (6) not being a member of the House of Representatives, member of the Senate, Political official, local administrator or member of local assembly;
- (7) not being or having been a member of political party or person holding any other position of political party within three years prior to the application date;
- (8) not being a judge of the Constitutional Court, judge of the Administrative Court, Election commissioner, National Counter Corruption Commissioner, State Audit Commissioner or National Human Rights Commissioner; Commissioner or National Human Rights Commissioner;
- (9) not being bankrupt or dishonest bankrupt;
- (10) not having been sentenced by a judgment to a term of imprisonment irrespective of whether the case becomes final or the sentence has been suspended, except for an offence committed through negligence, a petty offence or defamation and such case has not become final or the sentence has been suspended;
- (11) not having been expelled, dismissed or removed from official agency, State agency, State enterprise or local government organization on the ground of serious violation of discipline; violation of discipline;
- (12) not having been vacated from office of a member of the House of Representatives or member of the Senate upon any decision or resolution under the Constitution;
- (13) not having been removed from office under the Constitution; (14) not being a narcotics addict;
- (14) not having been ordered by a judgment or an order of the Court that his assets shall vest in the State on the ground of unusual wealth or an unusual increase of assets.

point is particularly addressed in Section 8 (7) which aims to free the Ombudsman from fixed political affiliations, by prohibiting a member of a political party or person holding any other position of political party within three years prior to the application date from applying. The provisions of incompatibility of public office in Section 8 (6) and (8) are another supportive provisions safeguarding the Ombudsman's impartiality.

In terms of conflict of interest, it should be noted here that the Ombudsman has a duty to submit to the National Counter Corruption Commission (NCCC) an account. This account must show particulars of their assets and liabilities and those of their spouses and children who have not yet become *sui juris* upon taking office. (Every three years while being in office and upon vacation of office, in accordance with the form prescribed by the NCCC.) In practice since establishment, no Ombudsman has ever been reported to be in violation of these restrictions. There is no evidence that the Ombudsman hold additional positions in the office or enter into business or employment relationship that might lead to his ability to be impartial and fair to be called into question.

In terms of qualification, the provision covers various issues which have been identified to foster public confidence in the impartiality of his exercise of office. Prohibition of certain personal backgrounds, as prescribed in Section (5) and Sections (9)-(15), ensures the high social status and integrity of the ombudsman would not be affected. The minimum age requirement is imposed to get a candidate with considerable working experience.

The post-holders appointed so far have been retired high-rank public officials who are considered established figures with a great deal of experience in administration of state affairs. Currently, the Chief Ombudsman, Panit Nitithanprapas, has a background as Inspector General of the Prime Minister's Office before he became Permanent Secretary of the Ministry of Social Development and Human Security. Prof. Sriracha Charoenpanich, was a law professor. The previous incumbents, Dr. Pravit Rattanapian was Permanent Secretary, Ministry of Science and Technology. Pramote Chotimongkol, held the positions of Deputy Permanent Secretary for University Affairs at the Office of the Permanent Secretary, Ministry of University Affairs before his appointment as Ombudsman. General Teeradej

Meepien, had a career in the military, and then served as permanent secretary at the Ministry of Defence prior to his appointment. Poonsub Piya-anant served as chief of the Budget Bureau before being appointed as Ombudsman. Pichet Soontornpipit, the first Ombudsman, was originally trained as a lawyer and served as Deputy Permanent Secretary for university affairs prior to working for the ombudsman office.

While it has been argued that former 'insiders' might be more inclined to favor their own class when performing scrutiny,<sup>31</sup> in the ombudsman community a background of senior experience in the civil service has often been considered advantageous for investigation due to the familiarity such experience brings with the practice of the bureaucracy. It is for this reason that former civil servants have been popular candidates for the office of parliamentary ombudsman in many countries. As is the case for Thailand, the 2007 Constitution specifically requires that the Ombudsman shall be appointed from the persons with knowledge and experience in the administration of State affairs.<sup>32</sup> Since establishment, seven ombudsmen have been recruited. All have been accepted as being well qualified for the position and no challenges made to the incumbent's qualifications. There has been no evidence to suggest that the Ombudsmen are personally involved in public agencies under investigation, nor that any decisions of the Ombudsman have been biased toward public agencies. On the basis of qualifications, the Ombudsman has been admitted to membership in the International Ombudsman Association, the Asian Ombudsman Association, and the International Ombudsman Institute.

### ***Selection process***

As discussed in chapter 3, the ombudsman appointment processes should ensure the appointment of an ombudsman who is a widely respected person and can be accepted by diverse political groups as unbiased and fair. Options may include processes such as appointment by a super majority in parliament, or a requirement that all the political parties within the legislature reach consensus on the person being appointed, or provision for a nominating committee to lead the process, together with an extensive consultation process. One of the best alternatives is one where the ombudsman is appointed, not by the government, but through a unanimous resolution of Parliament. However, in contrast with standard practice, the selection process of

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<sup>31</sup> Richard Thomas CBE, Jim Martin, Richard Kirkham, *External Evaluation of the Local Government Ombudsman in England*, April 2013, p. 38.

<sup>32</sup> The Constitution of Thailand 2550 B.E. (2007), Section 242.

the Thai Ombudsman is designed to exclude the involvement of the House of Representatives to prevent political domination of the process by the ruling party through the rule of majority.<sup>33</sup>

The Ombudsmen are selected by the resolution of the House of Senate who will pass a secret ballot in voting on one name out of three candidates nominated by a Selection Committee.<sup>34</sup> The Selection Committee consists of the President of the Supreme Court, the President of the Constitutional Court, the President of the Administrative Court, the President of the House of Representatives, the Opposition Leader in the House of Representatives and two persons selected by the Courts. Such a process of appointment by nomination, without parliamentary oversight can be counter-productive, and poses a challenge to the Thai Ombudsman. The fact that the Senate has a membership that is half selected is already seen as a conspicuous source of controversy.<sup>35</sup>

It is worth noting that, though the constitutional objective to ensure that the Ombudsman is free from political party influence has been realized, the exclusion of the involvement of the House of Representatives in the selection process has arguably resulted in undesirable repercussions on the perceived impartiality of the Ombudsman. Critics, including MPs, activists and commentators, who favoured appointment by a majority of a legislative body, have proffered the view that the Ombudsman's selection process is undemocratic<sup>36</sup> and that therefore the Ombudsman lacks legitimacy to scrutinize public office holders.<sup>37</sup> In fact, one commentator even remarked that the elaborate appointment system failed to secure impartiality.<sup>38</sup> The issues of impartiality that arise from the controversial selection

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<sup>33</sup> Somkid Lertpaithoon, 'The Origins and Spirit of the 2007 Constitution', in Wutthisarn Tanchai (ed.) *Exploring the 2007 Constitution, KPI Yearbooks 4*, King Prajadhipok's Institute, 2007, p. 23.

<sup>34</sup> The Constitution of Thailand 2550 B.E. (2007), Section 242 and 243.

<sup>35</sup> Thitinan Pongsudhirak, 'Opinion/ The Draft Constitution', General news, *Bangkok Post*, 20 April, 2007.

<sup>36</sup> More discussion see Andrew Harding and Peter Leyland, 'Constitutional Design in Thailand: the Management of Electoral Process in an Emergent Democracy', in T Groppi, V Piergigli, and A Rinella, *Asian Constitutionalism in Transition: A Comparative Perspective*, Giuffrè, Milan, 2008, pp. 69-105.

<sup>37</sup> Supavanee Amornjitsuwana and Srisudan Paisansakulchani, *Legal Problems of Independent Organization of the Constitution of the Royal Kingdom of Thailand B.E. 2550: Sources of Selection Committees*, Faculty of Law, Ubon Ratchathani University, 2011; Vorajet Pakeerat, 'Problems of Independent Organisation', *Matichon*, 23 May 2011, retrieved 21 October 2012, [http://www.matichon.co.th/news\\_detail.php?newsid=1306140947](http://www.matichon.co.th/news_detail.php?newsid=1306140947).

<sup>38</sup> Peter Leyland, 'The Quest for Good Governance in Thailand and the Thai Constitutional Watchdogs', p. 5, retrieved 26 October 2013, <http://camlaw.rutgers.edu/statecon/workshop11greece07/workshop16/Leyland.pdf>.



process became increasingly evident in the difficulties the Ombudsman faced in performing its function of monitoring ethical standards of political office holder. In this role it has been questioned and doubted the impartiality from both the government and the opposition as well as general public (see discussion on monitoring the code of ethics in chapter 7).

It is argued further that the Selection Committee should not be dominated by judicial figures as it is currently constituted, and should instead consist of members from various kinds of professions. The importance of this point is the fact that support for the ombudsman depends on the manner he/she is selected and the importance of power of those who choose them.

As noted above, all incumbents have been accepted as being well qualified for the position and no challenges made to their qualifications. Nonetheless, the challenge posed to the Ombudsman lies with the design of the selection process. One commentator pointed out that<sup>39</sup> with the Thai design of the selection process, it is difficult for the incumbent to be able to achieve trust by all parties, regardless of that person's possible professional qualifications, excellent personal skills and best intentions. In turn, it has been claimed that the selection process has impacted upon the effectiveness of the Ombudsman (as well as other watchdogs).<sup>40</sup>

### ***Conclusion***

After considering several components with regards to impartiality, it can be seen that many components that contribute to the perceived impartiality of the ombudsman are well in placed in the Thai scheme. There are legislative measures to protect the Ombudsman from conflicts of interest. The post-holders appointed so far have been retired high-rank public officials who are considered established figures with a great deal of experiences in administration of state affairs. The legislation also enables the Ombudsman to act impartially without fear of easy dismissal, as discussed earlier. But the most important problem lies in the Thai design of the selection process which could not create confidence in the impartiality of the Ombudsman. This problem is important because as we have seen the process of selection has weakened the Ombudsman's perceived impartiality and, consequently, the role of the Ombudsman has been subjected to skepticism.

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<sup>39</sup> Deputy Permanent Secretary to the Prime Minister Office Kamon Suksomboon, an interview with the author on 29 March 2013 at the Government House, Bangkok.

<sup>40</sup> Harding and Leyland, n. 35.

### 8.3 Effective powers

The extent of the powers of ombudsman institutions varies, but all have the basic power to investigate, recommend corrective actions, and issue reports. The questions identified in chapter 3 will be applied to test the Thai Ombudsman scheme in terms of its provision for investigatory powers and the ability to secure implementation of its recommendations through reporting to the legislature and public criticism.

#### *Power to investigate*

Without coercive power, the Ombudsman is compensated with strong investigatory powers. As identified in chapter 3, there are several factors which, taken as a whole, serve to secure the investigatory power of an ombudsman. In order to assess if the Thai Ombudsman is equipped with sufficient investigatory powers, these factors are examined by asking the following questions:

- *Does the legislation provide the Ombudsman with the right to require all relevant information, documents and other materials from those subject to investigation?*
- *Can the Ombudsman access all the public records necessary for an investigation?*
- *Is the Ombudsman able to investigate regardless of complaints where required in the public interest?*
- *Does the agency subject to the investigation have a corresponding duty to cooperate with or respond affirmatively to the Ombudsman's reasonable request of evidence related to the case?*
- *Have there ever been any problems in using these powers?*

The Thai Ombudsman is equipped with strong investigatory powers in order to correspond with its extensive jurisdiction which has extended beyond the administrative officials to include those from the legislature and the judiciary (see chapters 5 and 6). The Thai Ombudsman is empowered to start investigations on his own motion, even though the existence of injustice may be obvious.<sup>41</sup> This is also in line with most ombudsman schemes around the world in providing the Ombudsman

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<sup>41</sup> The Organic Act on Ombudsmen 2552 B.E. (2009), Section 15 '... In exercising of powers and duties under (1) (a), (b) and (c), the Ombudsmen shall proceed where there is a complaint thereon, provided that the Ombudsmen is of opinion that such act causes injuries to the public or it is necessary to protect public interests and, in such case, the Ombudsmen may consider and conduct investigation irrespective of a complaint.'

with the freedom to commence investigations even before a complaint is submitted (see Chapter 3). The Ombudsman may, at his discretion, consider and conduct an investigation irrespective of a complaint, where he is of the opinion that the act under investigation has caused injury to the public or it is necessary to conduct an investigation to protect public interests. This power enables the Thai Ombudsman to address underlying systemic problems within an organisation and public administration beyond an individual complaint, and thus supports the fulfilment of the Ombudsman's dual roles of reactive redress and proactive administrative improvement. As was described in Chapter 6, in practice, using this power the Ombudsman has instigated several own motion investigations to address major and systemic issues and to improve public administration.

The Ombudsman is provided with full powers to obtain evidence and examine witnesses, to require all relevant information, documents and other materials from those subject to investigation and to access all the public records necessary for an investigation.<sup>42</sup> In order to enhance cooperation with the Ombudsmen's investigation, in the performance of duties, the Ombudsman and officer are deemed the competent officials under the Penal Code.<sup>43</sup> This means there are penalties for failure to cooperate with the Ombudsman's request in his capacity as an officer or obstruction to the carrying out of the Ombudsmen's duties e.g. imprisonment for a term of not exceeding six months or to a fine of not exceeding ten thousand Baht or to both.<sup>44</sup> Therefore, potentially these are strong powers that

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<sup>42</sup> The Organic Act on Ombudsmen 2552 B.E. (2009), Section 15 In the performance of duties under this Organic Act, the Ombudsmen shall have the powers:

- (1) to request a government agency, State agency, State enterprise or local government organisation to give, in writing, a statement of fact or opinion concerning its performance or to submit any related object, document, proof or evidence for consideration;
- (2) to request the superior or officer of the agency under (1), public prosecutor, inquiry official or any person to give statement of fact in writing or orally or to submit any related object, document, proof or evidence for consideration;
- (3) to request the Court to submit any related object, document, proof or evidence for consideration;
- (4) to examine any place related to the complaint, but the owner or a person having possessory right thereof shall be informed in advance as necessary...

<sup>43</sup> The Organic Act on Ombudsmen 2552 B.E. (2009), Section 20.

<sup>44</sup> The Organic Act on Ombudsmen 2552 B.E. (2009), Section 45 Whoever violates or fails to comply with Section 15 (2) shall be liable to imprisonment for a term of not exceeding six months or to a fine of not exceeding ten thousand Baht or to both.

Section 46 Whoever fights with or obstructs the carrying out of duties under Section 15 (4) shall be liable to imprisonment for a term of not exceeding one year or to a fine of not exceeding twenty thousand Baht or to both.

Section 47 Whoever fails to comply with Section 21 shall be liable to imprisonment for a term of not exceeding six months or to a fine of not exceeding ten thousand Baht or to both.

can be enforced in the courts. As with most ombudsman schemes there are restrictions to such powers when applied to matters being investigated which have an impact on the security of the State, public safety or international relations. These investigatory powers are in line with ombudsman legislation elsewhere.

To date the Ombudsman has reported that the Office receives good cooperation from affected agencies in submitting documents or evidence, and there has been no report on legal enforcement measures against agencies to obtain documents or evidence.<sup>45</sup> Nevertheless, it should be noted that there is no data available to show how quickly public bodies are responding to requests and also slowness in responding to the Ombudsman's request by government officials was stated in the Annual Reports as a cause of delayed investigations.<sup>46</sup>

### ***Power to report***

Like similar legislation in other countries, the Ombudsman's recommendations and findings cannot be enforced in law. Instead, the Office of the Ombudsman, through a process found in the Ombudsman legislative framework, can use moral suasion to cajole and persuade the government agency concerned to provide a remedy and/or implement administrative reforms based upon its recommendations. Should the Ombudsman be dissatisfied with the steps taken by the concerned agency to redress issues, this process of moral suasion is facilitated through the power to report to higher level in the government (such as director of the department and the minister or Prime Minister) and to parliament, coupled with the power of publication. In examining the effectiveness of the Thai Ombudsman's powers to report, the following questions are applied.

- *Is there an expectation that the ombudsman's recommendation be implemented?*
- *Is the Ombudsman required to report to the legislature directly and regularly on the result of its operation or any specific matters resulting from an investigation?*

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<sup>45</sup> The Ombudsman's Annual Report; Ombudsman Sriracha Choroenpanich and Chief Ombudsman Panit Nitthithanprapas, interviews with the author on 3 March and 15 March 2013, at the Ombudsman Office, Bangkok.

<sup>46</sup> The Thai Ombudsman Annual Reports 2553, 2554, 2555 and 2556 B.E. (2010, 2011, 2012 and 2012).

- *Can the Ombudsman report non-compliance to a hierarchically superior individual or body?*
- *Can the Ombudsman report non-implementation to parliament?*
- *Can the Ombudsman publicise non-compliance?*
- *Is the Ombudsman required to publish an annual report?*
- *Does the Ombudsman have effective monitoring techniques to follow up the implementation of its recommendation?*

### ***Report on non-compliance***

The Ombudsman's legislation meets this expectation by requiring that if, within a reasonable time after making the recommendations, the recommendations of the Ombudsman are not complied with or acted upon in the first instance, he may write to the Minister of the department concerned requiring that suitable action is taken. If this further communication does not lead to the desired result, the Ombudsman can send the case to the Prime Minister or other senior figure to encourage action to be taken.<sup>47</sup>

After waiting for some reasonable period of time, if the government fails to take any action to comply with the Ombudsman's recommendation without reasonable ground and that matter is important or has a strong public interest dimension, the Ombudsman can use the last resort available: to submit a report on such matter to the Council of Ministers, the House of Representatives and the Senate for immediate consideration and may disclose the contents of such a report to the public.<sup>48</sup>

By the above provision, the condition for escalation to the legislature is that the matter must be important or relate to the public interest, and the Ombudsman has

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<sup>47</sup> The Organic Act on Ombudsmen 2552 B.E. (2009), Section 33(paragraph one) In the case where a government official, official or employee of a government agency, State agency, State enterprise or local government organisation fails to comply with the opinion or recommendation of the Ombudsmen on any matter within a reasonable period, the Ombudsmen shall inform the Prime Minister, Minister or the person controlling or supervising such government agency, State agency, State enterprise or local government organisation so as to have necessary order thereon and to report their implementation to the Ombudsmen forthwith.

<sup>48</sup> The Organic Act on Ombudsmen 2552 B.E. (2009), Section 33 (paragraph 2) After having conducted the proceedings under paragraph one for a reasonable period but the government official, official or employee of the government agency, State agency, State enterprise or local government organisation fails to comply with such opinion or recommendation without reasonable ground and that matter is important or relating to public interest or the public at large, the Ombudsmen shall urgently submit the report on such matter to the Council of Ministers, the House of Representatives and the Senate. Such report shall be disclosed to the public in accordance with the procedure as determined by the President of the Ombudsmen.

discretion to determine whether or not the matter meets the condition. At first glance this may seem to limit the power of the Ombudsman. But given the time constraints on parliament and the likelihood of an individual grievance attracting its attention without wider impact, this is arguably a reasonable approach and one which is replicated elsewhere. In the UK, for instance, in similar circumstances the Parliamentary Ombudsman ‘may, if he thinks fit, lay before each House of Parliament a special report’<sup>49</sup>. The Parliamentary Commissioner Act 1967 does not specify that a matter of public interest is involved, but the history of the use of the power by the Ombudsman is such that in practice special reports have not been submitted to Parliament unless the matter has been of some considerable significance. In addition, there are other channels available for the Ombudsman to secure implementation of his recommendations, such as referring to the Administrative Court or reporting non-compliance in his annual report. Besides if the Ombudsman is of an opinion that to preserve public interest, law or by law needs to be revised or amended, the Ombudsmen can inform the law reform organisation for further proceedings to make an urgent report to the Council of Ministers, the House of Representatives and the Senate for information, if such agency fails to proceed with that recommendation within a reasonable period.<sup>50</sup>

The Ombudsman’s unpublished record shows that since established the Ombudsman has furnished 77 non-compliance reports to the prime minister and concerned ministers, and 7 non-compliance reports to parliament out of the total process cases of 1,440 cases found against public bodies.<sup>51</sup> This represents 5.3 % of non-compliance with the Ombudsman’s recommendation. A rate of 5.3 % of non-compliance with the Ombudsman’s recommendation is relatively high when compared with other successful ombudsmen i.e. in the UK the compliance rate is 99 %.<sup>52</sup>

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<sup>49</sup> Parliamentary Commissioner Act 1967, s.10 (3).

<sup>50</sup> The Organic Act on Ombudsmen 2552 B.E. (2009), Section 32 In the case where the Ombudsmen recommends the agency under paragraph two to revise or amend the law, by-law, rule and regulation, if such agency fails to proceed with that recommendation within a reasonable period, the Ombudsmen shall inform the law reform organisation under the Constitution for further proceedings and shall urgently report that matter to the Council of Ministers, the House of Representatives and the Senate for information.

<sup>51</sup> From April 1999 to November 2012.

<sup>52</sup> Trevor Buck, Richard Kirkham and Brian Thompson, *The Ombudsman Enterprise and Administrative Justice*, Ashgate, Surrey, 2011.

Of these cases there is no information available on what actions have been taken by the Prime Minister or parliament following the reports, therefore it is not possible to tell how many were eventually settled and how many left outstanding. As such, there is not enough information to tell us what we need to know about the implementation of the Ombudsman's recommendation. It is also worth to note here that the Ombudsman has never published its compliance rate or made estimations. The Ombudsman's annual reports only stated that most of the recommendations have been complied with. This is because the Ombudsman currently does not systematically monitor the implementation of his recommendations (though the Ombudsman is required by law to include in the annual report the implementation of his recommendation by government agencies, this will be discussed under 'Annual report'),<sup>53</sup> which means that information on rejection or compliance is not readily available.<sup>54</sup> Therefore, at present it would appear impossible to verify whether this speculation of non-compliance rate is accurate.

In itself this is problematic and out of line with the operation of many ombudsman schemes. There are a number of risks here. First, failure to monitor compliance creates the danger that many grievances are left unresolved. It might be assumed that where a remedy is not made available then the aggrieved party should be in a position to submit a further complaint to rectify the matter, hence compliance can be measured by the lack of complaints made to the ombudsman about non-compliance. But not only is this a dangerous assumption given the relative positions of power of the complainant and the public agency concerned, the lack of data on the issue stored by the ombudsman makes this argument impossible to substantiate.

A further risk is that in redressing popular grievances and correcting the maladministration of individual government departments, if the ombudsman does not closely monitor the implementation of his recommendations and seeks feedback from the complainants about whether the maladministration has been properly dealt with, it is more difficult for the Office to demonstrate to the general public that it is making a difference. As such it might fail to meet the expectations of the people and end up being seen as a 'toothless tiger' in the public's eye.

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<sup>53</sup> Ombudsman Sriracha Charoenpanich and Dr. Issarabhath Teerabhathisiri, Director, the Ombudsman Office, interviews with the author on 3 March 2013, at the Ombudsman Office, Bangkok.

<sup>54</sup> Wasan Thepmanee, Public Relations Officer, the Ombudsman Office, an interview with the author on 3 March 2013, at the Ombudsman Office, Bangkok

Currently, the Ombudsman is considering putting in place a system to monitor implementation of its recommendations.<sup>55</sup>

### ***Annual report***

The Ombudsman has a duty to submit annually an annual report which shall include the recommendations that have not been implemented and indicate the relevant public agencies that did not co-operate during the investigation process or failed to follow the Ombudsman's recommendation.<sup>56</sup> The Act requires that the annual report shall be published in the Government Gazette and shall be disclosed to the public.

In practice, the Ombudsman has never denounced an administrative body for non-compliance in their annual reports, as the Ombudsman took the view that this would not be beneficial in their attempt to create a good relationship with public agencies.<sup>57</sup> Another reason could be attributed to the fact that the Ombudsman does not have a system to monitor compliance as mentioned above ('Power to report'). The means the fact that the Ombudsman has not made critical report denouncing any public bodies probably does not truly reflect that there are no problems for the Ombudsman in getting his decisions complied with.

It is not uncommon among ombudsman schemes that the annual report does not attract much attention and the Thai Ombudsman may be right not to use the annual report in such a way that can result in undermine the image of the concerned public bodies unless it is a serious case which the Ombudsman can issue special

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<sup>55</sup> Ombudsman Sriracha Charoenpanich, an interview with the author on 3 March 2013 at the Ombudsman Office, Bangkok.

<sup>56</sup> The Organic Act on Ombudsmen 2552 B.E. (2009), Section 43, the Ombudsman is required to submit its annual report to the Council of Ministers, the House of Representatives and the Senate each year. Section 43 requires that the annual report shall have at least the following information:

- (1) results of inquiries on all matters together with the advises; or
- (2) recommendations given to the government agencies, State agencies, State enterprises or local government organisations;
- (3) implementation of the government agencies, State agencies, State enterprises or local government organisations or State officials done or undone in response of the advises or recommendations of the Ombudsmen;
- (4) failures to comply with Section 15 of the government agencies, State agencies, State enterprises or local government organisations or State officials ;
- (5) violation of or failure to comply with ethical standard of a person holding political position and government official;
- (6) results of monitoring, evaluation and recommendation on an implementation of the Constitution;
- (7) hurdles in the execution of duties of the Ombudsmen.

<sup>57</sup> Ombudsman Sriracha Charoenpanich, an interview with the author on 3 March 2013, at the Ombudsman Office, Bangkok.



reports. But it can also be argued that the ombudsman annual report is an important means to provide full information of its operation as intended by the Constitution. And for this reason, if there is any non-compliance without justifiable reasons or any repetitive failure to perform it, an annual report should reflect so. However, as noted above neither the information on the result of escalation to the Prime Minister and Parliament nor the information regarding implementation rate is readily available. Without enough information, it is difficult for the Parliament, or the public make any assessments about the Ombudsman's work.

In addition to the above, it should be noted here that while there is the requirement for the Ombudsman to submit an annual report to both Houses of Parliament, there is no formal process by which such a report could be reviewed. To date there is little evidence that the parliament has reviewed the work of the ombudsman (this issue will be addressed later under 'Accountability').

### ***Special report***

In addition to an annual report, the Thai Ombudsman is endowed with power to report a matter that the Ombudsman considers 'urgent or beneficial to the administration of the State's affairs'.<sup>58</sup>

In practice, the Ombudsman has used this power in conjunction with the self-initiated investigation power (as noted above) to take a proactive approach to tackle problems which the Ombudsman has considered to have affected the Thai society as a whole and which require urgent attention from the government. Such investigations have resulted in several special reports which the Ombudsman has submitted to the House of Representatives, the Senate and the Council of Ministers for consideration and also made available to public (see Chapter 6 for more discussion of this power in practice).

The significance of this Section is that it gives the Ombudsman the power to report directly to both Houses, without having to first submit the Ombudsman's reports to public agencies. Hence, if the Ombudsman considers the matters concerned are urgent then he can submit such reports separately from the annual report. In practice, this power has proved to be useful for the Ombudsman. So far the

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<sup>58</sup> The Organic Act on Ombudsmen 2552 B.E. (2009), Section 43. The Ombudsmen may, if it deems appropriate, make a report on any specific matter to the Council of Ministers, the House of Representatives or the Senate for information if it deems that such matter is urgent or beneficial to the administration of State's affairs.

Ombudsman has published five special reports which the Ombudsman has submitted to Parliament and disseminated to the public. However, so far only one of these reports is known to have been implemented (for more analysis see Chapter 6).<sup>59</sup> There is no record that parliament has responded nor made comments on the reports or the Ombudsman has been summoned to inform Parliament of the reports.<sup>60</sup>

From the above discussion, there are two issues worth further consideration in relation to the Ombudsman's power to report. Firstly, normally the implementation of the ombudsman's recommendation depends on primarily two factors: the solidity of evidence and the practicality of the recommendation; and also and probably more importantly the support from parliament. As for the case of Thailand these two factors seem to be problematic. It appeared that the special reports have issues of evidence and practicality (see chapter 7) and secondly, the weak link with parliament does not seem to encourage Parliament to take much interest in the matter. (The Ombudsman is located outside Parliament's umbrella and the selection process is designed to exclude the House of Representative's involvement, see above discussion on independence.)

### ***Conclusion***

The Thai Ombudsman is endowed with equivalent or greater powers than most traditional ombudsmen in the support of its jurisdiction to undertake the task of resolving complaints as well as monitoring relevant systemic investigations powers. However, strong formal powers do not necessarily mean that the ombudsman's power to influence is correspondingly strong. In the Thai case, it is difficult to ascertain the persuasive power of the Thai Ombudsman. In addition, the Ombudsman's special reports do not seem to have had much effect. There is evidence to suggest that there are difficulties for the Thai Ombudsman in exercise the power to report. The Ombudsman's annual reports have not been reviewed by Parliament. As a result, the Ombudsman lacks sufficient political pressure meanwhile as a young institution its performance may not have built enough

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<sup>59</sup> The Ombudsman's Special Report on the Solution of Waste Water Crisis in Nakorn Pathom Province, 2007. In The Thai Ombudsman Office, *Thai Ombudsman at a Glance*, Bangkok, 2009.

<sup>60</sup> Based on Minutes of the Parliament available on [http://librarymb.parliament.go.th/snacm/minute\\_advance\\_search.jsp](http://librarymb.parliament.go.th/snacm/minute_advance_search.jsp); and the Ombudsman Annual Reports and the interviews with Chief Ombudsman Panit Nitithanprapas, an interview with the author on 15 March 2013 at the Thai Ombudsman Office, Bangkok; and Ombudsman Sriracha Charoenpanich, an interview with the author on 3 March 2013, at the Ombudsman Office, Bangkok.

credibility to command strong public pressure. This is a matter which may be related to the constitutional position of the ombudsman. These are issues that will be returned to in Chapter 9, as it goes to the heart of questions about the effectiveness of the Thai Ombudsman scheme.

## 8.4 Fairness

Fairness in the context referred to in this Section concerns the procedural manner in which an ombudsman conducts its work and not the fairness of individual decisions. In order to ensure that the decisions of the scheme are fair and are seen to be fair, here fairness will be tested using the following criteria.

- *Are the complainants advised of the reasons why the Ombudsman has decided not to investigate, cease to investigate the complaint or consider the complaint outside jurisdiction?*
- *Are respective parties provided with an opportunity to present their arguments and evidence?*

These requirements are largely catered for in the Ombudsman's legislations.<sup>61</sup> Detailed guidance outlining the procedure to be followed and the decision-making factors to apply for handling compliant and conduct investigation are provided and will be discussed below.

### ***Reject, cease to investigate and matters outside jurisdiction***

The Ombudsman has full discretion whether to accept a complaint for investigation, as in the 2009 Act Section 29, and to cease investigation if he finds no maladministration or injustice as in Section 28. In the event that the Ombudsman decides to cease an investigation because he is of the opinion that there is no administrative wrongdoing or unfairness, Section 31 expressly specifies that the citizen and the administration must be informed of the result of any investigation with 'the detailed reason why such act is lawful and fair shall also be clarified to the complainant'. This requirement to state reasons for decisions as laid down in the 2009 Act is mirrored in the Ombudsman's Regulation on Submission, Admission and Investigation of Complaints 2545 B.E. (2002), Sections 23, 24 and 25.

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<sup>61</sup> The Organic Act of the Ombudsmen 2552 B.E. (2009), Section 31; and the Ombudsman's Regulation on Submission, Admission and Investigation of Complaints 2545 B.E. (2002).

### ***Right to present arguments and evidence***

The Ombudsman has discretion to resolve complaints without full investigation, as the Ombudsman does not need further evidence. However, in investigating the complaint, the law requires that the Ombudsman provides respective parties with an opportunity to present their arguments and evidence. The 2009 Act, Section 31, ensures that both sides have the opportunity to input into the process:

Section 31. The Ombudsmen ... shall enable the complainant, government official, government organisation to give statement and present evidence in relation to their statement as appropriate.

This provision is amplified by the Ombudsman's Regulation on Submission, Admission and Investigation of Complaints 2545 B.E. (2002). The Ombudsman's Regulation on Submission, Admission and Investigation of Complaints 2545 B.E. (2002) Section 16 requires the investigator to invite in writing to the authority and those affected by the complaints to clarify the points in the complaints and submit a counter-affidavit. Such a counter-affidavit must be submitted within 30 days from receipt of the complaints, a period which can be extended if necessary. Under this Section, the complainants and the officials subject to investigation are allowed to make statements verbally, if the Ombudsman deems it appropriate. In practice, the Ombudsman has always emphasised giving the complainant such an opportunity to make an oral statement, as it is deemed that the inquisitorial method should not base solely on documents.<sup>62</sup>

### ***Conclusion***

Both the enabling legislation and the Office's procedural manual have measures to make sure that the decisions of the scheme are fair and are seen to be fair. The Ombudsman must provide reason for rejecting a complaint, ceasing to investigate and/or finding it outside jurisdiction, and the respective parties are provided with a right to present arguments and evidence. The Thai scheme therefore meets all the elements of this test. To date there is no evidence of expressed concern about the fairness of the Ombudsman's procedure. No complainant or local authority,

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<sup>62</sup> The Thai Ombudsman Office, *Twelve Years*, Bangkok, 2009.

thus far, has sought judicial review in the Courts against the fairness of decisions of the Thai Ombudsman.

## 8.5 Accountability

The issue of the accountability is a key concern for an ombudsman, with its long term credibility partially dependent on the capacity of the office to demonstrate the efficacy of its operation. In analyzing this issue, in Chapter 3 a series of important tests were identified.

- *Is the Ombudsman required to report to the legislature directly and regularly on the result of its operation or any specific matters resulting from an investigation?*
- *Does parliament allocate budget for the Ombudsman?*
- *Is the Ombudsman required to report regularly to parliament?*
- *Is the Ombudsman required to publish an annual report?*

The Thai Ombudsman can be held accountable through various ways, in particular: 1) parliament scrutiny; 2) removal by the Senate; 3) judicial review; and 4) external audit.

### ***Parliamentary scrutiny***

The primary accountability of the Thai Ombudsman is through its annual report. The 2009 Act, Section 43 requires the Ombudsman to report to the House of Representatives and the Senate within March each year through the submission of an annual report.<sup>63</sup> The annual report must show the outcome of the performance of its legislative function as well as the obstacles the Ombudsman encountered during the year. Section 43 also requires that the annual report shall be published in the Government Gazette and shall be disclosed to the public.

In practice, the Ombudsman's annual reports are submitted to the House of Representatives, the Senate and the Cabinet each year for information and discussion. They give details of its performance over the past 12 months, including financial reports and statistical information about the complaints received. Presenting the

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<sup>63</sup> Section 43 The Ombudsmen shall submit its annual report to the Council of Ministers, the House of the Representatives and the Senate within March of each year and one Ombudsman shall state the annual report to the House of Representatives and the Senate himself.

Annual report is the only occasion when the Ombudsman is in contact with parliament. To date, however, parliament neither acts nor proposes any actions in support of the Ombudsman (nor does the Ombudsman request this).

Thai legislation provides parliament as a mechanism of accountability to ensure that the office meets the expectation of standard ombudsman practice. However, the difficulty faced with many ombudsman schemes is that parliament does not pay sufficient attention to their annual reports, which reflects that the relationship between the Ombudsman and parliament is not that strong. This also is the case for the Thai Ombudsman. There have been occasions when the reports of the Ombudsman have been placed on the pending agenda; they have not been discussed by the House of Representatives (March 2010 and March 2011).<sup>64</sup> It means that no-one is properly calling the Ombudsman to account – how can we be confident that they are doing a good job? This issue will be returned to in chapter 9.

### ***Removal by the Senate***

As discussed under section 8.2.1, the Ombudsman, along with other holders of constitutional positions, are potentially subject to removal by a resolution of the Senate on grounds of misconduct, such as unusual wealthiness, or purports to commit corruption, malfeasance in office, malfeasance in judicial office or an intentional exercise of power contrary to the provisions of the Constitution or law, or gravely violates or fails to observe ethical standards. While parliamentary scrutiny tends to exercise control of the overall performance of the Ombudsman, impeachment proceedings are designed to tackle an individual incumbent's behaviour.

In practice, it would be interesting to see how effective the impeachment proceedings of the Senate would be. The Senate is tasked with endorsing the nomination and selection of the most senior members of the independent constitutional agencies including the Ombudsman (see selection process discussed above). But one appointed, the Chief Ombudsmen is a component of the Selection Committee for the appointment of the Senate.<sup>65</sup> Consequently, the Ombudsman will be removed by the Senators it is supposed to appoint. This is seen to be 'a clear

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<sup>64</sup> Minutes of the House of Representative Meetings, retrieved 28 October 2012, <http://library2.parliament.go.th/giventake/hr24.html>.

<sup>65</sup> According to Section 113, the Senate Selection Committee consists of the Presidents of the Election Commission, Ombudsman Office, National Counter Corruption Commission, State Audit Commission, as well as one judge of the Supreme and the Administrative Court each.

conflict of interest'.<sup>66</sup> Scholars and politicians have proffered the view that this patronage relationship has significantly damaged the effectiveness of the accountability of the Ombudsman, and in turn undermined the Ombudsman's credibility.<sup>67</sup> For some this is an issue that will have to be rectified to secure the legitimacy of the Ombudsman<sup>68</sup> and is central to the ongoing constitutional amendment debate. I will return to this matter in Chapter 9.

### ***Judicial review***

Activities of the Ombudsman can be subject to judicial review. Challenging the Ombudsman's decisions in courts is rare, as recommendations of the Ombudsman are not binding, and public bodies dissatisfied with the recommendation can lawfully choose to ignore them. To date only one action against the Ombudsman has been brought to the Constitutional Court requesting the Court's ruling as to whether an Ombudsman is competent to bring before an administrative court a case against the Auditor General.<sup>69</sup> However, the Constitutional Court rejected the application on the ground that the applicant was not permitted by the conditions and criteria of the Constitution<sup>70</sup> to refer the matter to the Constitutional Court. Since the Court refused to address the case, the subject matter of the case whether the Ombudsman has jurisdiction over the Auditor General was not decided.

### ***External Audit***

The Ombudsman Office is subjected to the scrutiny of the Auditor-General in so far as its management of its resources is concerned. So far there is no evidence that the Auditor has ever expressed any concerns.

### ***Conclusion***

While the Ombudsman is required to report to the legislature, in practice parliament has not paid sufficient attention to the work of the Ombudsman, in terms of both support and scrutiny. This outcome may be a result of the lack of a formal relationship with the legislature, and therefore a direct result of constitutional design. According to the 2007 Constitution the Ombudsman is not a parliamentary

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<sup>66</sup> Bjorn Dressel, 'Thailand's Elusive Quest for a Workable Constitution 1997-2007', *Contemporary Southeast Asia*, Vol. 31, No. 2, 2009, p. 17.

<sup>67</sup> Pongsudhirak, n. 34.

<sup>68</sup> State Councillor Professor Soonton Maneesawat, an interview with the author on 12 March 2013, Bangkok.

<sup>69</sup> The Constitutional Court's decision no. 57/2555 date 10 October 2555 B.E. (2011).

<sup>70</sup> The Constitution of Thailand 2540 B.E. (1997), Section 214.

ombudsman that investigates complaints on behalf of parliament, rather it is a constitutional independent organisation that scrutinises the ethical conduct of members of parliament. Therefore the legislature may not feel that it has to support the Ombudsman's recommendations. This lack of association with Parliament opens the door for questioning and attacks by political opponents regarding the efficacy of the Ombudsman's operation. This situation is further complicated by the removal process which is viewed by some as not being effective in calling the Ombudsman to account. How these provisions might be rectified or at least improved will be further explored in Chapter 9.

## **8.6 Conclusion**

We have seen that, from a theoretical point of view, the 2007 Constitution and the 2009 Act satisfy most of the requirements of an effective ombudsman institution. The Constitution itself has created the independent Office of the Ombudsman. Each office holder is appointed by a special selection committee and by Parliament. There are measures to safeguard the independence from the executive branch, such as the process of appointment and removal from office, provisions for autonomy in personnel administration, budgeting and other activities. The Ombudsman has discretion in every investigatory process. The resources available to the Ombudsman are solely decided upon by the discretion of Parliament in its annual budgetary appropriations. The Ombudsman has strong investigatory power. The legislative provisions are also strong in terms of procedural fairness. The Ombudsman does not have an enforcement power, but he has power to refer matters to ministerial or prime ministerial level to require action. If this fails, a report may be placed before parliament and the Ombudsman may publicise it as he sees fit.

An examination of the practice of the Ombudsman also has suggested that the Office's legislative framework has proved an effective basis for the functioning of the Ombudsman scheme. However, there are some aspects which are controversial and have proved to be crucial in the effectiveness of the Ombudsman, namely the method for appointing the Ombudsman which is not perceived by all to foster impartiality; the separation from parliament, which has resulted in difficulties in getting political support and attention for the office; and the process to remove the Ombudsman by the Senate which also potentially damages the Ombudsman's accountability. Besides, the Ombudsman does not have an implementation follow up



system which undermines the Ombudsman's practical effectiveness. The difficulties that these issues raise and how they could be ameliorated will be analysed further in Chapter 9.

With the empirical study of the Thai Ombudsman completed, in the next Part of the thesis the findings of the empirical study will be collated and an assessment made of both the role and the institutional design of the Thai Office of the Ombudsman. This assessment will lead to some recommendations for the future of the Thai Ombudsman scheme. Finally, observations for consideration of the wider study of the ombudsman enterprise will be mooted.

## **PART III- EVALUATION AND CONCLUSION**

## Chapter 9

### Evaluating the Office of the Thai Ombudsman

‘If an ombudsman office does not add value to the process of improving governance, and then show how it has done so, it may wither and die.’<sup>1</sup>

As has been pointed out at the beginning of the thesis, the Thai ombudsman has been faced with the risk of abolition twice since its establishment. The first occasion happened after ten years during the process of drafting the 2007 Constitution; and the second time during a parliamentary debate on the amendment of the 2007 Constitution in 2013. Both proposals were made on the grounds that the performance of the institution was not good enough in terms of fulfilling its mandate. Both these events raised questions about the objectives and the institutional design of the Thai Ombudsman scheme, and queries as to whether the office was fulfilling its objectives. These questions are at the heart of this evaluating Chapter, in which I review and pull together the findings presented during the course of this thesis. The Chapter also reflects upon the implications of the findings and offers some alternatives for future reform of the Thai Ombudsman.

Based on the empirical findings, arguments and conclusions as to the operation of the Thai ombudsman drawn from the previous Chapters (Chapter 6, 7 and 8), this thesis contends that there is evidence to suggest that the ombudsman has done a good job in resolving grievances from administrative wrongs and that there remains a strong role for the ombudsman to perform. This general conclusion will be dealt with in Chapter 10, together with the evidence of the office’s success. Further, the ombudsman has become one of the most important institutions in Thailand for the protection of constitutional rights.

Notwithstanding these strengths, however, there are some shortcomings which need to be ironed out and the purpose of this Chapter is to highlight the Office’s shortcomings in order to provide a critique of the ombudsman system in Thailand and to explore the options for reform and evolution of the office. In doing

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<sup>1</sup> André Marin and Gareth Jones, ‘Measuring Ombudsman Performance: Setting Performance Standards and Indicators’, in Asian Development Bank, *Strengthening the ombudsman institution in Asia: Improving accountability in public service delivery through the ombudsman*, Asian Development Bank Economics Research Paper Series, Asian Development Bank, Mandaluyong City, 2011, p. 8.

so, the Chapter uses the findings in this thesis to reflect back upon standard theoretical thinking on the ombudsman and develop our understanding of the manner in which ombudsman schemes operate and the limits to this model of dispute resolution.

Towards this end, this Chapter begins by analysing the various problems with the Office's performance and weaknesses in its institution design that compromise the ombudsman's essential features and undermine its ability to fulfil its potential. Then the difficulties and challenges faced in performing some of the Ombudsman's new roles are brought forward, which is followed by combined conclusions on the cumulative challenges that the office faces. This analysis leads to some suggested alternatives for the future of the Thai Ombudsman, including proposed solutions for reform. This Chapter ends by exploring the implications for the study of ombudsmandry as a whole.

## **9.1 Issues of institutional design**

Much has been written on the ombudsman. As Chapter 3 outlined, a standard and dominant supposition in the work on the ombudsman is that institutional design is important for the success of an ombudsman scheme. As a starting point, therefore, this thesis has examined the robustness of the institutional arrangements that are set up around ombudsman schemes, as taken from best practice in the area. Chapter 3 laid out a series of benchmarks by which the credibility of a scheme could be tested, ideas distilled from leading guidance on the topic. This checklist of ideas was applied in Chapter 6 and 8, with the findings presented in this study showing that overall the Office of the Thai Ombudsman conforms very much to the standard ombudsman model i.e. facilitating complaint services which are free of charges, easy to access, independent and impartial.

However, what this thesis has identified is that under the current arrangement there are three aspects of the Thai Ombudsman's design that are not in line with recommended practice:

- 1) the selection process for the Ombudsman suggests that the aura of impartiality around the Office may have been compromised;
- 2) the removal process may undermine the credibility of the Ombudsman as it compromises effective accountability;

- 3) the separation of the office of the Ombudsman from Parliament can make it more difficult for the office to obtain sufficient political support and carry out effective parliamentary scrutiny.

Individually and collectively, these shortcomings have the potential to negatively affect the credibility and effectiveness of the institution.

### **9.1.1 Selection process for the Ombudsman**

The selection process for an institution such as the ombudsman is the starting point for establishing impartiality.

According to the constitutional arrangements that have been put in place to establish independent constitutional organisations in Thailand, including the Ombudsman, it can be seen that one of the chief ambitions in designing these new institutions was a desire for them to be ‘impartial’ (Chapter 8). The findings of Chapter 8 show that the Thai Constitution has put in place almost all the standard recommended elements required to provide sufficient safeguard for an ombudsman scheme to retain the perception of impartiality. However, in doing so the drafters of the 2007 Constitution opted for an arrangement which made the Ombudsman independent, not just of the Executive, but of the leading political branch of the state, the House of Representatives. This is because under Chapter V of the 2007 Constitution, alongside Parliament, the Independent Organisations are designed as mechanisms to oversee the Executive and the drafters chose a solution that minimised the potential for the Executive to exercise direct or indirect influence over the appointment process. Therefore, the selection processes for the heads of the listed Independent Organisations, including the Ombudsman, are designed to minimise the involvement of the House of Representatives to prevent the political domination of the process by the ruling party through partisan influence indulged in by parliamentarians.

What this thesis has found is that this selection process may indeed shield the Ombudsman from direct political partisan control, but it has not necessarily reinforced the perceived impartiality of the Ombudsman. In this respect the Selection Committee, which is designated as an autonomous committee responsible for selection, does appear to conform to best practice insofar as it resolves the need to minimize the potential of the unfavourable impact of executive dominance in

selection of watchdogs.<sup>2</sup> But as happens in Thailand, when we look at the make-up of the committee in more detail, its weakness lies in its composition and the small number of its committee members.

The current process is organised through a seven-member Selection Committee, which is largely composed by judges and whose decisions are endorsed by a resolution of the House of Senate (Chapter 8). The small number of members on the Committee is viewed as potentially susceptible to external interference. This is because the Ombudsman is not selected by majority. Therefore, there is a fear that it would only require four of the members of the committee to be manipulated for the outcome of the selection process to be controllable externally. Further, the Committee's judge-dominated composition has been criticised as not conforming to the need for inclusiveness. As discussed in Chapter 8, being judge dominated and lacking in diversity, therefore, this selection process makes it harder to satisfy a wider range of stakeholders, especially political figures, that a suitable choice of persons has been considered and that the final appointment is non-aligned.

Such perceived deficiencies in the selection process have provoked public criticism and discontent towards the independent organisations, and has in turn raised questions regarding their legitimacy.<sup>3</sup> Politicians have used this lack of perceived impartiality against the Ombudsman, claiming that it was not legitimated, in particular, to scrutinise the ethical behaviour of Parliamentarians. As mentioned in Chapter 8, in fact this lack of faith in the formation of independent organisations has made it difficult for the incumbents of all Constitutional watchdogs to be able to achieve trust by all parties since the appointment process has not helped to ensure that the person selected is widely viewed as impartial, which is considered to be the essence of the independent watchdogs.<sup>4</sup> It is important to stress that apart from the problem that the process does not allow involvement of all parties, especially

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<sup>2</sup> Trevor Buck, Richard Kirkham and Brian Thompson, *The Ombudsman Enterprise and Administrative Justice*, Ashgate, Surrey, 2011.

<sup>3</sup> Paul Chambers, 'Superfluous, Mischievous or Emancipating? Thailand's Evolving Senate Today', *Journal of Current Southeast Asian Affairs*, 28, 3/2009: 3-38, p.25; Friedrich Ebert-Stiftung, 'Reform Constitutional Independent Organisation?', retrieved 20 October 2014, [http://www.fes-thailand.org/wb/media/Debate%20Show/Independent%20Agencies%20Reforms\\_final.pdf](http://www.fes-thailand.org/wb/media/Debate%20Show/Independent%20Agencies%20Reforms_final.pdf); Siripa Boontuan, 'Reform Constitutional Independent Organisations-Tie to people?', *Matichon*, 13 April 2014.

<sup>4</sup> Deputy Permanent Secretary to the Prime Minister Office Kamon Suksoomboon, an interview with the author on 29 March 2013, at the Government House, Bangkok; Peter Leyland, 'The Quest for Good Governance in Thailand and the Thai Constitutional Watchdogs', p. 5, retrieved 26 October 2014, <http://camlaw.rutgers.edu/statecon/workshop11greece07/workshop16/Leyland.pdf>.

politicians, there is no other allegation of impartiality. The issue, therefore, is predominantly one of perception but as pointed out previously (Chapter 3), perception that the stakeholders and general public hold of impartiality of an ombudsman is critical because an ombudsman must not only be impartial but also be perceived as impartial.

### **9.1.2 Removal process**

The study finds that another institutional weakness of the Ombudsman lies in the removal process used to tackle the, hopefully rare, situation when an office-holder no longer enjoys sufficient support for the performance of its work. According to best practice in ombudsman design, the removal process should be designed in such a way to safeguard the independence of the Ombudsman, while retaining the threat of removal as a significant means by which to make the Ombudsman accountable.<sup>5</sup> This means reducing to a minimum the involvement of the executive, because the executive is most likely to have a vested interest in the choice of office-holder. In order to secure independence, the removal authority is normally vested with the appointing body, or at least away from the executive. In the Thai framework, all incumbents of Independent Constitutional Organisations, including the Ombudsman, can be dismissed from office by the Senate. However, the removal powers of the Senate is arguably delegitimised by the chain of bonds between the Ombudsman and the Senate.<sup>6</sup> This conclusion follows because, once in office, the Chief Ombudsman, as well as other incumbents of the Independent Constitutional Organisations, are endowed with the power to appoint the Senate. Such a process creates a patronage relationship in which the Independent Organisations are responsible for selecting the members of the body which is primarily responsible for holding them to account. This circular relationship undermines the claims to the effectiveness of the accountability process, and in turn significantly damages the credibility and legitimacy of the Independent Organisations, including the Ombudsman. This claim is partially supported by the lack of any real evidence that the Senate has ever spent much, if any, time calling the Ombudsman to account. Indeed, the Senate Select Committee has no more formal responsibility with regard

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<sup>5</sup> Chapter 3 under 'Independence' and 'Accountability'.

<sup>6</sup> Chapter 8 under 'Removal by the Senate'.

to the Ombudsman, after the selection process has been completed. This issue of accountability is important, as it has been shown elsewhere that an important part of the ombudsman's armoury in securing its long-term legitimacy is its ability to be called to account.<sup>7</sup> But the goal of accountability becomes all the more important when the Ombudsman is empowered to investigate allegations of ethical misconducts of the public office holders and bureaucrats, as it is in Thailand. On the one hand, the public and leading stakeholders need to be reassured that this important power is wielded appropriately; on the other, the allegation of unaccountability is an easy weapon with which to target the Ombudsman. The current arrangement leaves it open to those who wish to attack the integrity of the office.<sup>8</sup>

Both the selection process and the removal process for the Ombudsman have been designed in theory to prevent the Ombudsman from the unfavourable impact of political influence in order to strengthen its independence and impartiality. However, in practice the methods used have had an unintended effect that undermines its perceived impartiality and accountability, two attributes which are essential for an ombudsman to perform effectively.

### **9.1.3 Separation of the Ombudsman from Parliament**

The design for the Ombudsman scheme in Thailand, therefore, has attempted to embed independence but perversely has done so in a way that both risks the perception of the integrity of the office and has created cause for the elected branch of the state to be suspicious of the Ombudsman. This latter observation leads to two further matters relating to the relationship between the Ombudsman and Parliament which warrant consideration: the ability of the office to obtain political support and the effectiveness of parliamentary scrutiny of the Ombudsman's work.

Under the 2007 Constitution, the Thai Ombudsman is located within Chapter XI, which is designated for Independent Constitutional Organisations. Such an arrangement creates a clear image of separation from Parliament and suggests that the Ombudsman is no longer an agent of Parliament. As argued above, this design structure has been chosen to distinguish very clearly the Ombudsman from the 'political' branch of the state, a structure in particular relevant to the role of the

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<sup>7</sup> Chapter 3 under 'Accountability'.

<sup>8</sup> Chapter 8 under 'Removal by the Senate'.



Ombudsman in relation to policing the enforcement of the ethics of members of Parliament.<sup>9</sup> However, with reference to the common legal framework for ombudsman schemes, the 2007 Constitution tends to use Parliament as a key mechanism through which to enforce the Ombudsman's recommendations and to hold the Ombudsman to account. In particular, the Ombudsman is required to report to Parliament each year through the submission of an annual report. But the impact of this process in Thailand has been negligible, as there have been occasions when the annual reports of the Ombudsman have been placed on the pending agenda and they have not been discussed by the House of Representatives.<sup>10</sup> Likewise, special reports of the Ombudsman have never been discussed in Parliament.

While this lack of attention to the work of the office may not be too dissimilar to that for many ombudsmen in other jurisdictions, the outcome reflects a relationship between the Ombudsman and Parliament which is not necessarily strong.<sup>11</sup> This outcome suggests that the Thai arrangement does not encourage Parliament's engagement in the Ombudsman's work. This lack of engagement is problematic in many aspects. The lack of engagement means that it is unclear that anyone is properly calling the Ombudsman to account and in turn does not help foster an environment of legitimacy around the office. Further, the lack of parliamentary attention not only results in insufficient scrutiny but also means that the office lacks a crucial source of support. One of the findings of Chapter 8 was that the Ombudsman's special reports had not been reviewed by Parliament, despite in principle Parliament being able to make use of the reports and to support the Ombudsman's work in return. This is problematic, as one of the purposes of the ombudsman generally is to provide for a source of information and insight into the work of the executive that can be used to enhance the scrutiny of the executive by a range of constitutional players, including Parliament. This does not seem to be happening in Thailand,

Another consequence that may follow if Parliament (in case the government is the majority in Parliament) does not pay attention to, or support the work of the Ombudsman, is that the public authorities that are under the control of the government may be encouraged to ignore or fail to comply or cooperate with the

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<sup>9</sup> Chapter 8 under 'Institutional independence and functional independence'.

<sup>10</sup> Chapter 8 under 'Parliamentary scrutiny'.

<sup>11</sup> Minutes of the House of Representative Meetings, retrieved 28 October 2012, <http://library2.parliament.go.th/giventake/hr24.html>.

work and recommendations of the Ombudsman. This tendency can be explained by the fact that the effective delivery of the soft power techniques operated by the Ombudsman, presumably involves a certain degree of appeal to reason and also a certain degree of expectation that a higher authority will ultimately support the Ombudsman's decision (anticipatory persuasion). Therefore the Ombudsman is dependent on political support both direct and indirectly, despite its need for independence and clear separation from government. In Thailand, while the Office of the Ombudsman is generally said to be respected, the Ombudsman's annual reports refer to the continuing failure by some government agencies to respond in a timely manner to requests by the Ombudsman for explanations or to resolve problems identified by the Office.<sup>12</sup> (However it should be noted here that there is not enough information to identify the cause of such delay, this conclusion must therefore be treated as tentative).

In the long term, it could be that the lack of an active relationship between the Ombudsman and Parliament may not be a major weakness of the Thai Ombudsman but rather a feature which is compensated for by other aspects of the scheme. Around the world, other ombudsman schemes do exist that operate successfully without the active support of a parliament. For example, in Australia where the Ombudsman is strong and there is government goodwill and therefore the Ombudsman rarely faces difficulties in persuading the government to accept its findings and recommendation.<sup>13</sup> In such a situation, it may seem that parliamentary support would not be particularly necessary for the Ombudsman's effectiveness, albeit it must not be forgotten that the status of an officer of parliament in many countries has helped strengthen the position and status of an ombudsman.<sup>14</sup> At the least, it is widely accepted that the support of parliament is an advantage, if not a prerequisite of a successful Ombudsman. As in the case of Thailand, arguably as matters stand, a clear structural separation from Parliament is in fact only a matter of image but does not lead to much of a difference in substance (i.e. in term of endorsement and reporting). However, such separation may result in negative consequences, as it tends to give a psychological effect on the side of MPs. Parliament may feel that it does not own the Ombudsman or the Ombudsman does not perform in its interest. Should we be

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<sup>12</sup> Chapter 8 under 'Power to investigate'.

<sup>13</sup> Buck et al, n. 2, p. 211.

<sup>14</sup> Chapter 8 under 'Report to parliament'.

surprised, therefore, that elected representatives regularly ignore the Ombudsman's work? The point of this discussion is it could be timely to reconsider whether this arrangement is a sensible starting position for a young office. Lack of political support may be detrimental to the future success of the institution when it has yet to build its credibility and gain strong public support and command respect.

## **9.2 Issues related to performance of functions**

The previous section outlined some conclusions that can be drawn from comparing the institutional design of the Thai Ombudsman scheme with best practice in global ombudsmandry. But this study has also explored the operational effectiveness of the Thai Ombudsman through a review of the output of office since its introduction.

This thesis has distinguished two strands of ombudsman work: the traditional function of the office that has been associated with it since the earliest years of the ombudsman institutions and which is almost universally expected of the institution; and the additional functions that ombudsman offices around the world have been required to perform.

With regards to its traditional role, the Thai Ombudsman and his staff appear to have handled a large number of complaints from citizens and can claim to have improved many of the government's administrative procedures (for a summary see Chapter 10). However, the study has also disclosed areas in the operation of the Ombudsman office that need to be addressed in order for the Office to achieve the potential of an ombudsman as a mechanism of administrative justice. These shortfalls include high backlogs in the number of complaints received by the office, insufficient statistical reporting and unimplemented special reports. Combined, such shortfalls in performance indicate an ombudsman scheme that might struggle to demonstrate its claims to legitimacy and authority.

The delivery of successful performance of these aspects of the ombudsman's work is not an issue covered in depth by the standard guides on the recommended institutional design of the ombudsman of the office. Instead, they are features of the ombudsman's work that demonstrate that it is necessary to look beyond the basic institutional design of an office, as promulgated in legislation and global ombudsman guidance, when considering its effectiveness. Indeed, the shortfalls that have been

identified in this work relate to aspects of the office that are considered key to its effectiveness in terms of the strength of its performance and ability to demonstrate impact.<sup>15</sup> Thus while the objective and role of the ombudsman can be justified, the ombudsman needs to be capable of demonstrating the effectiveness and accountability of its performance in order to retain its legitimacy.<sup>16</sup> Without such a narrative, it can be argued that delays in resolving grievances, a shortage of indicators to substantiate the office's distinctive value, and an inability to sufficiently generate and demonstrate a wide impact; are all outcomes that could contribute to an office being perceived as underperforming as a mechanism for the redress of administrative grievance and injustice.

### 9.2.1 Backlog

The Thai Ombudsman's formal procedures and powers are strong (Chapter 8). The arrangements in place are in line with good practice in many ombudsman schemes in terms of target times for each of its processes and systems for tracking the progress of complaints to measure their own performance.<sup>17</sup> However, the Ombudsman's statistics show that for the past four years from 2010-2014, the amount of pending complaints accounted for about half of the total amount received each year (Chapter 6, under 'Investigation'). By contrast, the cases which were completed within six months accounted for only 53.12% of total processing cases in that year,<sup>18</sup> even though its internal working procedures prescribes that *all* complaints coming into the office must be finished from start to end within six months.<sup>19</sup> The failure to meet set targets is indicative of an underperforming office because prompt complaint-handling is such a fundamental expectation of the office. These extended delays are not in line what it might be argued are implicit in general understandings of the principles of procedural fairness. In other words, a right to be heard implies a right to be heard and/or have a complaint handled within a reasonable time. Extended delays can put the credibility of the Ombudsman at risk

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<sup>15</sup> Richard Thomas, Jim Martin, Richard Kirkham, *External Evaluation of the Local Government Ombudsman in England*, 2013, retrieved 25 October 2014, <http://www.lgo.org.uk/GetAsset.aspx?id=fAAxADcANwA3AHwAfABUAHIAdQBIAHwAfAAwAHwAQ>; Marin and Jones, n. 1.

<sup>16</sup> Marin and Jones, n. 1.

<sup>17</sup> *ibid.*

<sup>18</sup> Chapter 6 under 'Investigation'.

<sup>19</sup> Chapter 6 under 'Investigation'.

and result in discouraging complainants. It should be noted that in his annual reports the Ombudsman has not picked up backlog as a significant problem and therefore the reasons for the current backlog have not been identified.<sup>20</sup>

### **9.2.2 Insufficient statistics and reporting**

Performance statistics are regularly used to support claims that an ombudsman office is operating effectively and thereby used to garner public support. Yet the database and the statistical reports used by the Thai Ombudsman have not been constructed in a way that can be employed to demonstrate fully its distinctive value. The Ombudsman's records provide general information ranging from the number of enquiries/complaints received/ screened out/ withdrawn/discontinued; the mode of lodging complaints; outcome of inquiries/complaints; area of concentration of caseload; and direct investigations completed. However, it is not possible to discover other important information, such as the proportion of the case load concerns relating to grievance resulting from injustice, as opposed to issues to do with legality, or cases resolved through preliminary inquiries, early settlement, or full investigation. Thus while the information available gives a useful description of its remit, action and outcome, the information does not show the whole picture of the Ombudsman's operation.<sup>21</sup> The need to do better and provide more informative data is illustrated by the following points.

First, the Ombudsman's strength lies in its ability to provide justice in the grey area beyond hard law and beyond the jurisdiction of Administrative Courts. While there is evidence to suggest that the Ombudsman has been successful in assisting persons who were affected by an unintended anomaly in a legislative rule that could not be effectively addressed by judicial review to obtain a suitable remedy, the Ombudsman does not provide a classification of the caseload concerning issues relating to grievances resulting from injustice, as opposed to issues to do with legality that it has nevertheless successfully resolved. We do not know, therefore, how many cases the ombudsman resolves in which the complainant does not have a strict legal entitlement or an alternative redress route. Therefore, its distinctive value

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<sup>20</sup> While carrying out fieldwork in Bangkok during May 2014, I have asked to see one of the Ombudsmen for more questions on this issue of backlog but at that time I could not reach him because the building where the Ombudsman Office was situated was not accessible due to civil unrest and the Ombudsman and staff were not able to retrieve the data.

<sup>21</sup> Chapter 6 under 'Alternative Dispute Resolution'.

in providing an effective remedy is not easily demonstrated by the statistics and thereby not easily appreciated. The Ombudsman is only one of many channels through which the administrative grievances are resolved. Without showing its distinctive value, there will be always scepticism of the Ombudsman's utility.<sup>22</sup>

Secondly, despite the Ombudsman claiming that most of its recommendations have been complied with, the Office does not have a process in place to follow up on the implementation of its recommendations. As a result, the Ombudsman does not have the statistical records to show how many of its recommendations have been implemented and whether or not implementation is actually producing the results it had hoped for.<sup>23</sup> This in turn negatively impacts the Ombudsman's effectiveness as a grievance redress mechanism and poses serious risks for its institutional credibility and image. Most ombudsman schemes can quantify in percentage their implementation rate because it is often advanced as a useful measure of how an ombudsman is doing, and as an indicator of the credibility of the ombudsman office.<sup>24</sup> In this respect, some of the Asian Ombudsman Association's members, for example the Hong Kong Ombudsman, has been noted for their sophisticated computerised complaints management system of which experience could be advantageous to the Thai Office.<sup>25</sup>

### 9.2.3 Unimplemented special reports

The importance of the Ombudsman institution lies not just in the reactive role played by the Ombudsman in finding a satisfactory solution to an individual grievance, but in the proactive role played by the Ombudsman in identifying defects in the administration and recommending remedial measures or even changes in policy or interpretation of law.

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<sup>22</sup> For example, in an effort to demonstrate its achievement the Commonwealth Ombudsman's fact sheet adopts a more expansive concept of remedy, to include an apology, financial compensation, proper explanation, reconsideration of agency action, and expediting agency action. Those categories are now used by the Commonwealth Ombudsman as a key performance statistic. The Commonwealth Ombudsman stated that in 2007-08 a remedy was recommended by the office in 75% of the complaints that it investigated, see John McMillan, 'Future Direction 2009 – The Ombudsman', Paper to Australian Institute of Administrative Law National Administrative Law Forum, Canberra, 7 August 2009, 63 AIALForum, 2010.

<sup>23</sup> Chapter 8 under 'Report on non-compliance'.

<sup>24</sup> Chapter 3 under 'Power to report', 'Monitoring implementation'.

<sup>25</sup> George V Carmona, 'Strengthening the Asian Ombudsman Association and the Ombudsman Institutions of Asia', in Asian Development Bank, *Strengthening the ombudsman institution in Asia*, n. 1.

On the positive side, there is no evidence to suggest that the recommendations by the Ombudsman with regards to redress of individual grievances have largely been ignored. Thus it may be reasonable to trust the Ombudsman's claim that most of his recommendations in this respect have been complied with. The findings also reveal that the Ombudsman has made some progress in securing administrative improvements with his systemic recommendations. These achievements are proudly reported as highlighted cases in the Ombudsman's annual reports.<sup>26</sup> But on the downside, all four high-profile special reports that have been produced and submitted by the Thai Ombudsman during the past five years have remained undebated by the House of Representatives and unimplemented by public authorities.<sup>27</sup>

As charted in Chapter 8, the reason for the high level of unimplemented recommendations could have much to do with the impracticality of the recommendations being made. Often they appear to involve new policy initiatives, with one of the reports still being disputed by the concerned department which has denied the accuracy of its findings. Therefore, the Ombudsman's efforts to increasingly seek to demonstrate their value by conducting investigations with a systemic component has not created the impact intended by bringing about reforms that improve governance for all. Further, the credibility of the Ombudsman as an investigator could have been damaged insofar as some of its reports appear to have resulted in disputed findings. Given the high profile nature of systemic reports, if too often reports lead to disputes about the content of the findings, this compromises the core business of the ombudsman. Leading advocates of a systemic approach to ombudsmandry, Marin and Jones, have forewarned the challenges in this area if '[j]ust one investigation ... does not follow the principles of excellent investigation. .... [I]t will prove very difficult to reclaim your credibility, if just one of your investigations is shown to be shoddy.....'<sup>28</sup> If this is true, it is therefore crucial for the Thai Ombudsman in the near future to focus on reestablishing its credibility through demonstrating the robustness of its findings. To achieve this goal it may have to reconsider the way it organises its investigation process.

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<sup>26</sup> Chapter 6 under 'Recommendations to improve administrative procedure'.

<sup>27</sup> Chapter 6 under 'Special reports'.

<sup>28</sup> Marin and Jones, n. 1.

### 9.3 An excess of roles

An expansion of the mandate of the ombudsman will ordinarily place additional burdens on an ombudsman scheme and will require corresponding sufficient resources to be provided if the scheme is to continue to perform effectively (Chapter 4). The study in this thesis has found that although the Thai Ombudsman has not suffered from cutbacks, there is evidence to suggest that the office has experienced practical difficulties as a result of insufficient resource and expertise (Chapter 7). Further, the difficulties have had an adverse effect on the effective performance of its mandate. The Ombudsman is a young and a small office, which contrasts with the fact that the Constitution gives the Ombudsman a powerful jurisdiction to follow up and report on the implementation of the Constitution by the government. The Ombudsman is also to review the implementation strategy of the government to ensure that the objectives of the Constitution are met.

The requirement to track the implementation of the constitution by all departments creates a massive workload. To cope with a problem of insufficient manpower, the Ombudsman has in the past relied on the statistics collected by the Secretary to the Cabinet (Chapter 7). This solution resolved the Ombudsman's manpower problem by avoiding hiring more staff to deal with data collection, but by reporting the same data as the government the Ombudsman was criticised for not adding value to the information provided elsewhere.

As for the evaluation of the constitutional implementation which requires extensive knowledge of public law, the Ombudsman has not been able to perform this function due to a lack of required expertise and this has led to negative critique against the Office's performance. Further, the Ombudsman's role and competence in this area has been critiqued by public law academics. The approach taken by the Ombudsman to resolve this problem has been to appoint a committee (in 2012) to work on a formula for evaluation, yet still no clear result of this work has been presented after three years.<sup>29</sup>

There is a very real danger that this mandate has created a false expectation about the capacity of the office which has not been met. A point to be considered is whether the Ombudsman should be allocated with more resources in order to meet with the demand of this specific mandate or whether it is better to remove this task of

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<sup>29</sup> Chapter 7 under '(ii) Monitor and evaluate implementation of the Constitution'.



the Ombudsman's jurisdiction. This point must be considered by taking into account another problem associated with this task which will be shown in section 9.4.

## 9.4 Advocacy

It has been argued in this thesis that advocacy contradicts the good practice of an ombudsman (Chapter 4) because objectivity and impartiality is the essence of an ombudsman (Chapter 3). Advocacy in so far as it entails taking sides is incompatible with the ombudsman's image of unaligned and impartial investigator and in turn would undermine its persuasive power.

The findings in this study empirically supports the above assertion that advocacy is not compatible with an ombudsman. There is evidence that the Thai Ombudsman has engaged actively in policy advocacy by involving his office directly in public policy debates, albeit without success.<sup>30</sup> This is particularly evident when the Ombudsman constantly criticised some major government policies while seeking to introduce different policy initiatives in its special reports. Another example of the advocacy role can be found in the constitutional mandate which gives the Ombudsman the power to make recommendations for the constitutional amendment. It has been suggested in this thesis that this function provides the Ombudsman with a platform to venture into policy advocacy. Under this mandate, the Ombudsman has sought to suggest amendments to the Constitution and proposed its own draft law for consideration to Parliament. However, it is noticeable that the Ombudsman's draft has by and large been ignored.

The advocacy role of the Thai Ombudsman has an adverse effect on the non-political nature of the institution and put the Ombudsman's ability to remain objective in question. Being a constant vocal critique of the government's major policies while proposing its own policy initiatives and draft constitutional amendment was generally perceived as competing with the legislature while the government interpreted such role as acting in the interest of the opposition party.<sup>31</sup> Consequently, this led to the perception that the Ombudsman's recommendation was based on political considerations which was problematic, as it is naturally more difficult for a government to accept recommendations which are perceived to be

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<sup>30</sup> Chapter 6 under 'Special reports'.

<sup>31</sup> Chapter 7 under 'Preparing proposals for constitutional amendments'.

prejudiced or biased. This factor would most probably partially explain why the Ombudsman's proposals on policy and constitutional amendments have not always been followed.

## 9.5 Political controversy

Comparatively, the ombudsman institutions worldwide have in general avoided getting involved in politically controversial matters, due to the importance of maintaining political neutrality (Chapter 4). However, based on the empirical evidence obtained for this study, this thesis found that the Ombudsman institution in Thailand has found itself having to fulfil a highly political and controversial role in its task of monitoring the ethical misconducts of political office holders. In performing such a task, the Ombudsman investigates allegations of ethical misconduct and then refers the issue to Parliament or the department concerned, if it is satisfied that there is a *prima facie* breach as a result of misconduct (Chapter 7).

Investigation of the ethics of politicians can be considered under the branch of anti-corruption and is an additional role to their traditional function, albeit the role of the ombudsman in this sphere is limited. It is also a role which is found to be more common in developing countries than established democracies.<sup>32</sup> One reason that the role of investigating ethical issues is not a widespread feature of the ombudsman's work is that without an enforcement power, an ombudsman is not well-suited to fight corruption effectively and also the adversarial strategies are in conflict with the ombudsman's cooperative model.<sup>33</sup>

As for the Thai Ombudsman, as shown in Chapter 8,<sup>34</sup> performing this task has become even more difficult because of the political circumstances. There is evidence to suggest that the Ombudsman was perceived as a means for political opponents to make vexatious or mischievous allegations about each other. This is because political opponents have been tempted to use the code of ethics to discredit one another, because a breach of the ethical codes can lead to dismissal of office or at the very least damage their reputation. Therefore, apart from damaging the

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<sup>32</sup> John Hatchard, 'The Ombudsman in Africa Revisited,' *The International and Comparative Law Quarterly*, Vol. 40, No. 4, October, 1991, pp. 942-3; P Jiaying and L I Cheong, *Comparative Study of Ombudsman Systems of Asia*, Research awardees for Comparative Studies of Ombudsman Systems in Asia jointly sponsored by the Commission against Corruption of Macao, China, and the Macao Foundation, 2008.

<sup>33</sup> Chapter 7 under '(a) Incompatibility of roles'.

<sup>34</sup> Under 'Report on violation of the Code of Ethics'.

Ombudsman's relationship with the government after the Ombudsman launched investigations against some leading politicians, it has placed the Ombudsman into political conflict and made it a target for political attack with some politicians appearing to regard the Ombudsman as a threat. So far the Ombudsman has found no breach of the ethical code by these political actors (though it has found and reported a number of ethical misconduct with regards to public officers), which is probably due to fact that the allegations were groundless or it might be because by handling the process of investigation, the Ombudsman tended to avoid becoming a party to the conflict. Whatever the reasons be, the result is that the Ombudsman became subject to criticism for weakness and ineffectiveness.

But for the Thai Ombudsman the difficulties lie with its status. The point stressed here is that it is hard for the Ombudsman to avoid being seen as politically biased when it is required to get involved in political conflict by its mandate. This means that its various tasks are made much more difficult for the Thai Ombudsman because it struggles to gain trust from all parties while its image as an effective organisation has been damaged. Therefore, it may be timely to reconsider whether the onerous responsibility of ensuring the integrity of political leaders is a task that the Ombudsman can realistically carry out.

## **9.6 The danger of unelected institutions**

One of the potential problems with unelected institutions identified in Chapter 4 is that while these constitutional watchdogs are introduced to provide for a more effective constitutional check and balance, there is a risk that watchdogs might serve subtly different purposes to what they were established for. This could be because the watchdogs may reinterpret the jurisdictional boundaries of their position to suit their own vision of how their office should operate.<sup>35</sup> The result might be increased public mistrust if they are deemed to be inappropriately overstepping their mandate, and eventually questions will be raised as to whether they should continue in operation. It is argued in this thesis that the Thai experience endorses the potential dangers implied by the theory. As it can be seen, the Thai Ombudsman has aggrandise its role beyond the monitoring of government administration which should be the core of its function, to evaluate some of the major government's

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<sup>35</sup> Under 'Dangers of unelected institutions'

policies. In doing so the Ombudsman was seen as evaluating the performance of the whole government.

The Ombudsman's legislation explicitly imposes restrictions on the Ombudsman's power to investigate the policy of the government.<sup>36</sup> This provision preserves the basic principle of ministerial responsibility to Parliament and a separation of powers. In effect, this means that the justifiability of a policy of government is excluded from the Ombudsman's jurisdiction. However, we have seen that on many occasions the Ombudsman's special reports have sought to criticise the merits of some of the government's major policies. According to the Ombudsman,<sup>37</sup> the justification for such interventions is based on its statutory power to investigate the 'performance of or commission to perform duties of a government official which unjustly causes injuries to the complainant or the public whether such act is lawful or not'<sup>38</sup>. Based on this provision the Ombudsman took a view that all government policies that result in social injustice fall under his jurisdiction.<sup>39</sup>

However, it must be emphasised that the effect of this provision is to enable the Ombudsman to inquire into administrative decisions in circumstances where injustice has occurred but such decisions may go unchallenged in courts and therefore is intended to provide the Ombudsman as a means available to aggrieved citizens to seek relief. It is argued that if the Ombudsman takes a view that all government policies that result in social injustice fall under his jurisdiction, there is a chance that the Ombudsman could invoke the government policy to comply with his own criteria of injustice. In doing so, it could follow that the Ombudsman could be seen as having ignored the fact that such recommendation may be difficult if not impossible to be adopted. This is because governments necessarily are required to take heed of political criteria when making policy-based decisions, and they are obliged to be willing to be held accountable under the democratic norms of parliamentary government. By contrast, the approach adopted by the Ombudsman risks carrying it away from the original design of the institution which was constructed to avoid political entanglements and overt public assessment of public officials. As well observed by a scholar, '...many incidents pointed to the fact that independent agencies in Thailand focused more on sustaining their 'super

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<sup>36</sup> The Organic Act on Ombudsmen 2552 B.E. (2009), Section 28.

<sup>37</sup> The Ombudsman Annual Report 2549 B.E. (2013).

<sup>38</sup> The Organic Act on Ombudsman, 2552 B.E. (2009), Section 13 (1) (b).

<sup>39</sup> The Ombudsman Annual Report 2549 B.E. (2013).

independence’ than to check and to hold the government to democratic accountability, and this will ultimately threaten democracy.’<sup>40</sup>

Another potential problem is multiple accountability, as in-built into the Thai constitution by the creation of a series of constitutional unelected watchdogs, is that there is a danger of public bodies being exposed to over-scrutiny. To mitigate such a danger, a constitution should be designed to provide an accountability system to the general public in a manner that avoids unnecessary duplication.<sup>41</sup> This study reveals that with regards to making recommendations on constitutional implementation functions, there are serious duplications of functions between the Ombudsman and the Law Reform Commission. Such duplication is found in section 81 (3) of the 2007 Constitution<sup>42</sup>; and with regards to the supervision and monitoring of the ethics of persons holding political positions, there are serious duplication of functions between the Ombudsman and the Office of the National Anti-Corruption Commission. Such duplication is also found in section 250 of the 2007 Constitution of Thailand.<sup>43</sup> The intention of the Constitutional Drafters for these duplications is to provide extra layers to guarantee accountability, but it also means that the Ombudsman does not provide a distinct contribution or additional benefits. Duplication of function is inconsistent with the underpinning theory that the Ombudsman is designed to fill gaps in existing coverage, as argued in Chapter 2. Duplication of functions also risks inconsistency of decisions. The question remains which institutions are more suitable to undertake such functions. This point will be returned to in section 9.9 which will suggest reduction of the role of the Thai Ombudsman.

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<sup>40</sup> Siroj Klampaiboon, ‘Independent Organisations and Democratic Accountability’, 21 July 2014, retrieved 20 January, 2015, <https://twitter.com/tcijthai/status/490865240108564481>.

<sup>41</sup> Richard Kirkham, ‘The 21st Century Ombudsman Enterprise’, paper presented to the IOI biennial conference, November 2012, Wellington, New Zealand, retrieved 23 May 2013, [http://www.theioi.org/downloads/o32s/Wellington%20Conference\\_04.%20Plenary%20II\\_Richard%20Kirkham%20Paper.pdf](http://www.theioi.org/downloads/o32s/Wellington%20Conference_04.%20Plenary%20II_Richard%20Kirkham%20Paper.pdf).

<sup>42</sup> Section 81. The State shall act in compliance with the law and justice policies as follows: (3) preparing the law establishing the autonomous law reform organisation for the purpose of reforming and developing laws of the nation and revising the existing laws for the compliance with the Constitution, with due regard to opinions given by persons affected by such laws;

<sup>43</sup> Section 250. The National Counter Corruption Commission shall have the following powers and duties ... (5) to supervise and monitor moral and ethics of persons holding political positions.

## 9.7 Difficulties of political context

It has been argued by some that the ombudsman model cannot operate as it was intended to without the spirit of democratic responsibility from which the institution evolved.<sup>44</sup> The experience of ombudsmen in different parts of the world has shown that regardless of their formal powers, the chances of success and the survival of this institution in its functioning to redress public grievances, protect individual rights and liberties, are much more favourable in a democratic environment with strong rule of law systems than in countries where democracy and the rule of law is weak.<sup>45</sup> The empirical data gathered and analysed in this thesis would suggest that the overall democratic order has a considerable bearing on the performance and effectiveness of the Ombudsman institution.

Following this claim, any study of the effectiveness of a specific ombudsman scheme must take into account the environment within which it operates. In this respect, it is important to take note of the fact that unlike their counterparts in many other developing countries, the Thai Ombudsman office has operated, generally speaking, in a fairly favourable environment. Despite political instability due to frequent military interventions,<sup>46</sup> freedom of expression and freedom of the press are constitutionally guaranteed as well as respected in practice.<sup>47</sup> Free elections, an independent judiciary and a British type of public administration, including neutral career civil servants, have all been salient features of Thai political systems.<sup>48</sup> Thailand has a good human rights record.<sup>49</sup> In fact, Thailand was considered to be one of the most democratic countries in Southeast Asia until the 2006 Military Coup.<sup>50</sup>

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<sup>44</sup> P Nikiforos Diamandouros, 'Human rights and non-judicial remedies - the European Ombudsman's perspective', speech at the London School of Economics and Political Science, London, 30 November 2005.

<sup>45</sup> Najmul Abedin, The Ombudsman in developing democracies: the Commonwealth Caribbean experience, *International Journal of Public Sector Management*, Vol. 23 No. 3, 2010, pp. 221-253.

<sup>46</sup> The most recent one happened in May 2014 while this study was approaching its final stage.

<sup>47</sup> Ted L McDorman and Margot Young, 'Constitutional Structures and Human Rights in Southeast Asia: Cambodia, Indonesia, Thailand and Vietnam', 47 *U New Brunswick L J* 85, 1998, at 90-91, 93-95; Tom Ginsburg, 'Constitutional Afterlife: The Continuing Impact of Thailand's Post-Political Constitution', *University of Chicago Public Law & Legal Theory Working Paper*, No. 252, 2008, p. 9.

<sup>48</sup> McDorman and Young, n. 28, at 94-95.

<sup>49</sup> *ibid.*

<sup>50</sup> Vitit Muntarbhorn and C Taylor, *Roads to Democracy: Human Rights and Democratic Development in Thailand*, International Centre for Human Rights and Democratic Development, Bangkok and Montreal, 1994, at 1-10; R B Albritton and T Bureekul, *Thailand Country Report: Public Opinion and Political Power in Thailand, A Comparative Survey of Democracy, Governance and Development*, Working Paper Series No. 34, Asian Barometer Project Office, National Taiwan

This relatively calm operating environment is reflected in the experience of the ombudsman. The Ombudsman has not, in the main, run into difficulties of apparent disregard for his requests for information or in the implementation of its recommendations. Albeit that it has been argued above that delay in resolving complaints has been an issue, no-one has suggested that this can be attributed to unwarranted delay on the part of public servants and authorities in responding to requests, or a seemingly unwillingness to conciliate matters. In this respect, as will be argued below, under current arrangements there are very real prospects of improved performance for the Ombudsman institution should its role be restricted to its classical role. However, the polarisation of Thai politics and society which has developed since 2006 and has become a prominent aspect of Thailand has almost certainly posed very real challenges for the Thai Ombudsman in the delivery of its new mandates. As happened, politics of extreme – of ‘us against them’ or ‘you are either with us or against us’<sup>51</sup> have resulted from a deep polarisation in Thai politics, a situation that has tended to place the Ombudsman at a greater disadvantage. Thus although the Ombudsman has sought to preserve its political neutrality, both the advocate role of constitutional check and the controversial roles of ethics have subjected the Ombudsman to much partisan pressure. Therefore, arguably the ombudsman office is faced with an almost impossible task given the context in which it is supposed to operate.

## **9.8 Conclusions on the operation of the Thai Ombudsman's scheme**

The point raised by Marin and Jones at the beginning of this Chapter resonates with much of what I have observed on the Ombudsman in Thailand. Ombudsman schemes need to be able to demonstrate their effectiveness and relevance if they are to secure the support of key stakeholders. From the foregoing discussion it can be seen that the working of the Ombudsman institution and the context or environment in which it operates indicates that it has a number of limitations or shortcomings, and its performance record is not so satisfactory. Collectively, the main problems that the study has identified are to do with excessive

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University and Academia Sinica, Taipei, 2007, 1-38, retrieved 20 September, 2013, <http://www.asianbarometer.org/newenglish/publications/workingpapers/no.34.pdf>.

<sup>51</sup> Central problem is rural-urban divide which disagree on how to equalize the benefits of economic development and ensure equal political representation. The unending deadlock and polarization is at the roots of the current political crisis which eventually led to the 2014 coup.

and possibly inappropriate powers and functions. Overall, the design of the Thai Ombudsman pays insufficient attention to the different competencies required to perform the different roles that it has been given. As a result, it is arguable that the Ombudsman is required to serve very different needs, with some of those needs not compatible with the core functions for which the office has been established. The evolution of roles in Thailand may be broadly in line with an international trend towards a proactive watchdog model with multiple functions, and away from a traditional model where the ombudsman's powers and mandates have been rather restricted in line with traditional expectations of administrative justice. But the Ombudsman institution has developed differently in Thailand to elsewhere and the context in which it operates is arguably more challenging than in many other countries.

In particular, in the overwhelming majority of countries where the ombudsman has been introduced, it has developed on a different path to Thailand, with ombudsman schemes being given extensive periods of time in which to embed their service before being challenged to undertake new functions. In Thailand, in the 1990s the Ombudsman as a new scheme was unable to demonstrate its effectiveness and had yet to earn credibility and respect. But in its second decade, it has moved from instability to controversy as it has not been able to perform fully and has begun to lose the trust of Parliament and the executive. It has been argued in this thesis that this latter trend has come about as a direct result of the 2007 Constitution, through which Parliament was portrayed as giving the Ombudsman a 'leap' by granting it new and extensive powers. This amendment was a direct response to its earlier underwhelming performance, but the Ombudsman institution has not found it possible to forge ahead as rapidly as had been hoped. Moreover, as a direct consequence of the reforms to its mandate, its impartiality and political neutrality, among its most important assets, have appeared to be compromised.

The risk that this thesis has uncovered is that its diminishing credibility in terms of impartiality and political neutrality has increased the difficulties that the Thai Ombudsman encounters in discharging his responsibility and gaining the confidence and respect of the political class and citizens. The relationship between the Ombudsman and the citizens also remains unclear, as new roles take the Ombudsman away from the citizen. In the future, the Thai Ombudsman will not be



able to rely upon the weapon of public opinion to the same extent that ombudsmen elsewhere in the world are generally able to do.

## **9.9 Implications for the future of the Thai Ombudsman**

This section considers a number of separate ways forward for the Thai Ombudsman.

### ***(a) Abolition of the office***

If it can be argued that the Thai Ombudsman is not delivering on the full range of its functions, then one available solution is to abolish the institution and transfer its functions elsewhere.

An initial riposte to this solution, however, is that there remain very strong reasons for retaining its functions and it remains very unclear that there are any obvious alternatives for much of what the Ombudsman currently does. The Thai Ombudsman was introduced as part of an attempt, initiated by the Thai people, to reform the nation's politics and administration. Before its introduction, for around fifty years there had been demand for providing additional avenues for justice for aggrieved citizens from administrative actions and eventually the 1997 Constitution recognised this demand by providing for the Ombudsman as an additional avenue for redress. Since then, despite the fact that Constitutions have been annulled by coup d'états, the Ombudsman has survived and continued to function without any apparent impairment. This existence may be taken as a sign of its continuing relevance in the Thai society, notwithstanding the claims of this thesis that it could do better.

Moreover, abolishing the office would do nothing to address the underlying reasons for the office which remain just as important today as when the Ombudsman was first established. The argument of this thesis is, therefore, that a more logical solution is to make the office more effective. Despite the fact that the Ombudsman scheme cannot fulfil all of its current aspirations in full, there is evidence to suggest that the Ombudsman institution has made some positive contributions in dealing with individual complaints, and demonstrated its ability to elaborate on particular social problems (see Chapter 10 for a summary of this claim). In fact with its robust legal framework, the Thai Office has considerable potential for growth and development. However, as observed by Abedin, democratic institutions and values are like delicate

plants, they need careful nurturing to grow and thrive.<sup>52</sup> Therefore the Thai society should be patient. In hindsight, the 2007 Constitution was too ambitious in its expectations of the Ombudsman, which suggests that the model needs refining but not abolition.

***(b) Continue with the 2007 solution***

It is logical to first consider whether the ombudsman can be more effective in this existing model before having to make major changes to its formal functions and structure. As such, before considering the ways in which the Ombudsman might be reformed, an alternative way forward is to retain the existing model but address its weaknesses. There are options to reform the current Ombudsman scheme's operation and resources. It might also be possible to introduce new processes to assist the Ombudsman in gaining real traction in the implementation of its recommendations in the areas of ethical review and reviewing the implementation of the Constitution. But it is suggested here that the operating practice of the Ombudsman since 2007 reveals that the problems lie less in the processes and resources of the office, but more in the nature of the new functions and in the political context within which it operates.

The difficulty is that, as has been argued throughout this thesis, the 2007 model has conferred on the Ombudsman functions that the Ombudsman and the office are not able to adequately perform. As referred to previously (Chapter 8), this strong model was imposed to raise the Ombudsman's profile, without adequate consideration of the implications it would have on the Ombudsman. The result has been to overload the Ombudsman with tasks it is not designed or prepared to handle. The new mandates have carried the Ombudsman away from its original core role, as a provider of justice for aggrieved citizens as was initially intended.

As it has turned out, the chances of the Ombudsman succeeding in the delivery of these tasks is very limited under the current political situation. Moreover, as argued above, even in a more stable political environment, these functions would be difficult for an ombudsman to perform effectively. Additional functions and the expectation that come with those functions always risk detracting the Ombudsman from the performance of its core role. This is not to suggest that the Thai Ombudsman be forever restricted only to its original aims and functions, but it is

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<sup>52</sup> Najmul Abedin, 'The Ombudsman in developing democracies: the Commonwealth Caribbean experience', *International Journal of Public Sector Management*, Vol. 23 No. 3, 2010, p. 221-253.

argued here that to travel so far on its current path of portraying a mechanism of control responsible for holding executive branch accountable has caused disproportionately adverse effects on the Ombudsman. In particular, the Ombudsman is losing its status as an impartial referee and thereby losing its legitimacy as an independent accountability mechanism. Besides it is unrealistic to assume that resources could be stretched indefinitely.

It is, therefore, likely that, even if the current processes of the Thai Ombudsman were improved and resources enhanced, the problems with the institution's standing would remain, while the underwhelming response of Parliament to its recommendations would continue. This very likely outcome means there is a continued danger that the Ombudsman's reputation will be damaged. The Office's failure to meet expectations would undermine people's respect and eventually lead to public disillusionment with the concept which would make it more difficult to continue to perform its entire function. My considered conclusion here therefore, taking all matters into account is that to resolve the problems needs more than a slight adjustment of the existing model.

### ***(c) Reform the existing model***

The foregoing discussion examined the potential for a slight adjustment of the existing model, which does not involve radical shifts in the model of the 2007 Constitution. There are more radical options, however, to address the present predicament of the Ombudsman. One is to make changes to the current institutional design of the Ombudsman under the 2007 Constitution. Another is to relieve the Ombudsman altogether of the responsibilities in relation to monitoring leadership codes and constitutional implementation, as conferred to it by the Constitution. It is contended that these changes are necessary in strengthening the standing of the Ombudsman. This section develops the proposal that the office's institutional design should be altered.

Underpinning the argument is the principle that the institutional design of the office is essential in supporting the effective functioning of the ombudsman. The key problem with the current institutional design identified above is that its perceived impartiality and accountability are compromised. Further reform should aim to bring the Thai model to meet with the standard ombudsman practice.

Above it was argued that the selection process for the Ombudsman was a major part of the problem. One option is to increase the numbers of the committee members and include MPs on the members of the selection committee. The thinking here is that greater diversity on the committee would result in a wider acceptance of the person recruited and help resolve the current perception of lack of impartiality. Moreover, increased parliamentary participation at the selection stage might assist in attracting the interest of parliamentarians in the Ombudsman's works and hence encourage a better utilisation of the Ombudsmen by Parliament and more parliamentary scrutiny.<sup>53</sup> If such goals can be furthered, then this solution would also contribute towards addressing the problem of inefficient accountability process of the current arrangement. This would in turn strengthen the Ombudsman politically as well as enhance the Ombudsman's democratic legitimacy.

Perhaps it would be worthwhile to consider the setup of the selection committee in the 1997 Constitution, which was more widely accepted than the current set up because it promoted a greater diversity and inclusiveness of participation. The 1997 model prescribed the selection committee of 31 members comprising of representatives from political parties (19); rectors of state universities (4); Office of Public Prosecutor (4); and Supreme Court (4).<sup>54</sup> If it was felt that this process excessively favoured politicians, the ratio could be adjusted to reduce the political portion to be less than half to prevent domination by political sector. While this process will bring the Ombudsman closer to the political branch than the current model, it is argued that it will not result in the Ombudsman losing its independence as there are measures as has been illustrated in Chapter 3 that were already put in place to sufficiently preserve elements necessary for the ombudsman's independence.

The above suggestion on parliamentary involvement at the selection stage might be expected encourage a better utilisation of the Ombudsmen by Parliament and more parliamentary scrutiny. In addition, it is contended that the Ombudsman should be brought back under Parliament domain and that a special standing committee that receives reports from the Ombudsman should be established. Realignment towards Parliament would theoretically create a closer link and more

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<sup>53</sup> Chris Gill, 'The evolving role of the ombudsman: a conceptual and constitutional analysis of the "Scottish solution" to administrative justice', *Public law*, No 4, October, 2014, at 667-7.

<sup>54</sup> The Thai Constitution of 2540 B.E. (1997), Section 262; The Organic Act on Ombudsmen B.E. 2542 (1999), section 6.

direct relationship which will be beneficial in drawing more parliamentary support. A special standing committee would provide a designated institutional support and scrutiny for the Ombudsman that deals with the reports and the recommendations of the Ombudsman. This arrangement is suggested as an effective solution in many jurisdictions to deal with the problem of Parliament's showing little interest in the work of the ombudsman, which is also considered suitable for Thailand, in particular, given the Ombudsman being a new institution and Parliament's lack of experience with this new system and means of controlling administration through the Ombudsman.

***(d) Reduce the roles of the office***

This thesis has demonstrated that the core function of the Thai Ombudsman is to provide individual redress and to promote good administration. As confirmed by the Thai Ombudsman as well as its stakeholders, specifically the members of parliament (Chapter 6), the addition of new functions should not change its core functions or lead to the Ombudsman moving away from these dual core functions. It has been argued that the broad and unfit mandates currently conferred on the Ombudsman have made it difficult for it to fulfil its functions effectively. It is therefore contended that, in the Thai context, the Ombudsman should focus on its core functions and be removed from the duty of performing those additional roles that are unfit for the office.

In order to provide greater focus and to streamline the mandate of the Ombudsman, the functions of investigating ethical misconducts and conducting constitutional checks on the government ought to be removed. This refocussing, it is argued here, would allow the Ombudsman the space with which to address its performance issues, such as the backlog of complaints and the development of a formal follow-up system on the implementation of recommendations. As mentioned above, given that these mandates were also assigned to other Constitutional agencies, that is, the National Counter Corruption Commission, and the Law Commission, it is unlikely that the constitution would be significantly weakened by such a reform to the Ombudsman's jurisdiction.

Another reason that supports the removal of these functions from the Ombudsman's jurisdiction is that, given the relevance of the objective of

establishment of such agencies and in terms of required expertise and the available resources they have, these agencies are more suitable to fulfil these particular tasks than the Ombudsman. This removal would also safeguard the Ombudsman from any perception of acting politically through intervening in policy issues or in a partisan nature through accepting controversial referrals of unethical allegations from politicians, and this would also remove the unnecessary duplication of functions. The Ombudsman hence would retain its original constitutional traditional role in administrative justice: investigating administrative complaints; taking own initiatives to address systemic problems; and the subsequent expanded mandate of sifting constitutional cases for the Constitutional Courts which helps further the constitutional goal of administrative justice.

***(e) Improve performance issues***

The empirical data analysed in this thesis reveals that there are a number of weaknesses in the operation of the Thai Ombudsman scheme that undermined its effective performance, such as the backlog of cases, the lack of formal follow up procedure after recommendations and insufficient statistical reports. As pointed out above, one of the problems facing the Thai Ombudsman is that it has not demonstrated its value and its distinctive contribution. It is argued that these weaknesses could have led to the perception that it has underperformed. It is therefore contended that these operational weakness should be addressed without delay. Given the danger of abolition on grounds that the Ombudsman has underperformed, addressing weaknesses in the performance of the Ombudsman is as important as the reform of its mandate and institutional design.

In summary, the thesis suggests that the way forward for the Thai Ombudsman is to reform its institutional design, refocus on its core roles and fix the operational weakness.

### **9.10 Implications for the study of ombudsmandry**

The study of the Thai Ombudsman conducted in this thesis not only provides an improved understanding of the Thai Ombudsman and identifies potential solutions for reform, it also generates some insights for the study of ombudsmandry more generally. This Chapter concludes by summarising what this thesis tells us about how the ombudsman institution should be understood in a liberal constitution.

#### ***Further evidence for the need for an ombudsman institution***

An underlying feature of the ombudsman design is that it has a role to play in liberal constitution because it fills a gap in the justice arena which would otherwise occur. Around the world, ombudsman schemes have been introduced in many countries to deal with citizens' grievances against administrative abuses, especially in the grey areas for which there are no legal rights for compensation. Here the experience of many countries has been that the existing safeguards do not provide adequate protection for their citizens and political sanctions fail to redress grievances. The office of the Ombudsman in Thailand, as we have seen, was instituted relatively recently precisely for this purpose. There had been a parallel discussion on the creation of an ombudsman office and an administrative court in Thailand in order to deal with complaints against public authority. Despite concerns of opponents that the existence of both an ombudsman and an administrative court could constitute an unnecessary duplication of functions, after long debate, eventually the 1997 Constitution established both the Administrative Courts and an Ombudsman Office. The Ombudsman's function and powers are designed to expand the ability of citizens to pursue grievances beyond the traditional public law redress available in the Administrative Court and therefore the Ombudsman has a distinct constitutional role. The parallel existence of the Ombudsman and the Administrative Courts in the Thai context provides another example that these institutions serve different purposes and confirms the accepted view that courts and tribunals alone are not capable of resolving all administrative disputes.

#### ***Further evidence of the integrity branch in operation***

Based on the notion that traditional constitutional institutions provide insufficient control, various institutions, including the Ombudsman, were established in the Thai Constitution to complement the deficiencies in the tripartite model. These bodies were set up in a way as to give them legitimacy to control (i.e. clear

separation from the executive and the legislature, guaranteed independent scrutiny), and have been vested with substantial control powers with which to perform their duties. To indicate the constitutional importance of these watchdogs, their status have been recognised as Independence Organisations in Chapter XI of the 2007 Constitution. The Ombudsman has a distinctive role as a separate mechanism for resolving administrative injustice, protecting constitutional rights and providing an additional check on the Executive. In this respect, the Thai Constitution, featuring a complex set of “guardian” institutional safeguards against legislative overreaching, constructed in nested institutions, exemplifies a recent trend in constitutional drafting towards embedding more complex mechanisms of constitutional accountability. A key aspect of this form of constitutional design is to employ different types of power to hold the government accountable or what has been collectively described as an “integrity” branch of the constitution.

### ***Better understanding of the limits of the office***

A particular area of ombudsmandry about which much remains to be understood is the effective limits of the ombudsman enterprise in terms of the functions that it can be deployed to deliver. There has been a tendency for ombudsman schemes around the world to being given an increasing variety of new roles, in addition to their traditional core function of combating maladministration. Experiences suggest that governments may find it convenient or economic to give ombudsmen new roles as the need for these roles become apparent, in circumstances where these roles do not fit easily elsewhere and where it is considered costly to set up new institutions. The question remains as to whether this distribution of constitutional responsibility is always appropriate.

There is general agreement that the Ombudsman is an organization that is highly flexible and that it is not necessary to restrict the use of the model to basic complaint handling alone. However, it has been also suggested that an ombudsman is not a panacea and the experience of the Thai Ombudsman illustrates many of the potential risks involved in expecting too much of the ombudsman model. As it happens with the Thai Ombudsman’s model, it turns out that some of the new additional roles that have been granted to it have failed. Recent works of scholars as



well as practitioners<sup>55</sup> have now cautioned about what an ombudsman should or should not do. Building from these works, this thesis has constructed a set of explanatory criteria which may help us explain why some roles might be less suitable to an ombudsman scheme and the background contextual factors that might also lead to an ombudsman scheme failing in its delivery of certain functions (Chapter 4). This set of ideas has been used to analyse the problems in the Thai Ombudsman scheme which has been given mandates beyond the classical model.

In Chapter 4 it was argued that, both from theory and practice, it is clear that significant thought has to be put into assessing whether certain roles are compatible with the ombudsman model. Some roles will be incompatible as a matter of principle, others because of the political and social context within which they operate. In this latter respect, it was also argued that the ombudsman is peculiarly sensitive to political resistance, a factor which should also be accounted for when decisions about roles for the ombudsman are decided upon, as should the potential for the new role to sow general confusion amongst politicians, administrators and the public as to what service the ombudsman is primarily in place to deliver. Additionally, it needs to be considered whether the ombudsman can be realistically resourced with the expertise and staff to implement a new role. Finally, Chapter 4 argued that for an ombudsman scheme to be effective in the long-term, the inherent dangers of unelected institutions need to be properly managed.

In all of these respects, this study found that, certainly in the case of Thailand, there are practical limits to the range of roles that an ombudsman can be required to fulfil. The findings broaden the academic literature and also the academic debate about the evolving roles of ombudsmen and better understanding about the limits of the office. The Thai experience in expanding the ombudsman's jurisdiction helps illustrate that the risks such as, conflicting roles; politically controversial roles; problems of overloaded office; and duplication of functions are real. The Thai case also shows that limits of an office could be attributed to different factors such as, delay in handling complaints; no formal follow up system on the implementation of recommendations; insufficient statistical report; and unimplemented special reports. These are shortcomings which could lead to underperformance despite the institutional design being robust.

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<sup>55</sup> See Chapter 4.

### ***Further evidence of the strength of the institutional design model and its weak point***

The experience of the Thai Ombudsman shows that the Ombudsman's effectiveness does not always follow automatically from having a stronger and wider power and provides further evidence that the non-coercive soft powers of an ombudsman is one source of its effectiveness and when combined with other feature such as independence, impartiality etc. can constitute a strength. This reflects in its achievement as a mechanism for redress of administrative grievance and improving administrative practice. But the Thai Ombudsman's case also illustrates that this strength must be connected with other factors, such as the implementation of its recommendations by the government and parliamentary positive support. The eventual outcome of its effort and its credibility as an institution is dependent on such perusal. Even though the Ombudsman makes a recommendation which is sensible and backed up by extensive data drawn from exhaustive investigations and research, without implementation no one will see the concrete result of such recommendation. This could mean that even the best effort by the institution, the ability to operate effectively may be stifled by the negative effect of its context. It is therefore difficult for an ombudsman to be seen as an effective institution on its own.

### ***Better understanding of the importance of context and overall constitutional support in a variety of forms***

From the above discussion, political and government support must be given to the ombudsman institution, its work and recommendations. Political and government support depend on circumstances. With the Thai case it can be seen that the fact that Parliament is indifferent to the Ombudsman's work and recommendations together with the eroding relationship with the government, hinders the Ombudsman's effectiveness. Because of the political context, the Thai Ombudsman has a difficult task to maintain impartiality, which is not made any easier as many issues can become more and more politicised as the ongoing political conflict has made it more difficult for the Ombudsman to draw government and political support. The Ombudsman's ability to fulfil its additional role with regards to monitoring the politician's ethics was limited. The Thai experience exemplifies how the context can negatively affect the ombudsman's effectiveness and the importance of constitutional support to optimise the ombudsman's effectiveness.

### **9.11 Thailand as a special case?**

The argument has been made above that the study of Thailand in this thesis displays certain trends and events that add to our broader understanding of ombudsman institutions elsewhere in the world. But it might be objected that Thailand is a special case, being a newly democratizing nation, which experiences regular military coups. It might also be argued that the problems experienced by the Thailand Ombudsman are entirely explainable by the special political context within which it operates. Such a claim would require further study, but a preliminary rejection will be offered here. This thesis has conceded all along that an ombudsman scheme needs to be devised to match the context within which it operates. Indeed, one of the strengths of the institution is that it is so capable of being adapted to meet different social, economic and political contexts. The theoretical model developed in Chapter 4 specifically makes allowance for such inherent local issues to be factored into ombudsman design, and part of the rationale for arguing in this thesis for a more limited model for the ombudsman is due to the challenging context within which the Thai Ombudsman operates. However, the claim of this thesis is also that Thailand is not so unusual (e.g. see Chapter 5). The country has a large, educated middle class, a relatively robust civil society and has in recent years been one of the best-performing economies in the world. Thailand has also experienced chronic political instability, but similar to other Asian countries, recently Thailand's Constitutions have been engineered for the purpose of constructing a more perfect democratic political system with strong constitutional guarantees of citizens' rights and high aspirations towards social justice. The Constitution's elaborate mechanisms of separation of powers and mechanisms of checks and balances, such as the new watchdogs Constitutional Court, Administrative Court and independent commissions on elections and anticorruption, and the Ombudsman, represent one the codification of one of the world's most advanced constitutions. Above all, although new in many respects, the country's administrative justice system is complex and includes overlapping layers of dispute resolution processes.

As this thesis is finalised, a new Constitution is being drafted. In the view of this author it is entirely right that the standard understandings of best practice in ombudsmandry (Chapter 2 and 3) should continue to apply to its design.

## **Chapter 10**

### **Conclusion**

#### **10.1 Introduction**

This thesis examines the characteristics and the operation of the Ombudsman system in Thailand from its inception since 1997 until 2014. In this final chapter, the main findings of the thesis are summarised and some of the major issues and arguments emerging from the analysis above are presented.

The Thai Ombudsman remains a young institution, but, as this thesis has shown, it is an institution upon which many hopes were pinned by the Constitutions of 1997 and 2007. Yet there has been little research on the Ombudsman, notwithstanding its constitutional status. Due to this lack of empirical evaluation of the Thai Ombudsman system, this research is original and necessary, all the more since the office has been subject to significant political criticism. This study, therefore, is the first attempt to offer an external, independent review of its performance and to interrogate the extent to which it meets a set of expectation of ombudsman institutions accepted across the globe. In doing so, the thesis provides original empirical evidence of the work of the Thai Ombudsman in practice.

In meeting this need for improved understanding and analysis, this research is based on a study of existing legislation, as well as the practical results achieved by the Thai Ombudsman. To gain an understanding of the latter a range of resources has been collated, including the annual speeches and reports of the Ombudsman, documentary material obtained from Parliament and the Thai Ombudsman office, and the research and methodological literature produced both by ombudsmen themselves and by academics. To triangulate and better understand the information gathered through literature reviews, this thesis has been supported by a series of elite interviews with the team of Ombudsmen in Thailand, a member of the Constitution Drafting Assembly, senior public officials and public law professors.

In order to examine the characteristics and the working of the Ombudsman system in Thailand, in the introductory chapter three aims were set:

- 1) to examine the functions of the institution, in order to discover how it measures up to its objectives as well as to the ombudsman standard practice;
- 2) to review its institutional design, with a focus on whether it is in line with the standard features of the ombudsman; and
- 3) to test whether the Ombudsman operates with an excessive remit and to identify whether its existing collection of roles is appropriate.

The results of the findings will be structured according to these aims.

At the start of the thesis, a theoretical framework for analysis was developed as a means to understand how the ombudsman works, and how and why characterising it as a mechanism of administrative grievances aids our comprehension of it (Chapters 2 and 3). This framework outlined the standard claims made in favour of the institution in its traditional role of resolving complaints from members of the public against government agencies and undertaking systemic investigations to address issues with an aim to improving administrative practice. By reviewing a wide range of studies on the ombudsman institution, past and present, a list of fundamental features and characteristics that are deemed essential to the institution's unique role were identified as core to the effective design of an ombudsman. These standards were developed further into a set of criteria boxes.

This analytical framework is useful in terms of unpicking the extent to which the Ombudsman's contribution as a mechanism of administrative justice measures up to its objectives, as well as the standard practice. Applying this framework, the study reveals that the ombudsman has contributed significantly in resolving grievances from administrative wrongs and improving administrative practice. Indeed, it can be claimed that the office has become one of the most important institutions in Thailand for the protection of constitutional rights.

## **10.2 The Thai Ombudsman and administrative justice**

The Thai Ombudsman was initially established by the 1997 Constitution to handle complaints of grievances from individuals in dealing with government bodies. Though it was given additional mandates by the 2007 Constitution, this complaint-handling mandate remained its core function. Indeed, the 2007 Constitution gives

the Ombudsman the power to initiate investigation without complaints to enhance the Ombudsman's ability to improve administrative practice.

A key focus of this thesis is to establish whether the Ombudsman has produced results in terms of its complaint-handling role. This analysis was undertaken in particular in Chapter 6, where it was concluded that overall the Ombudsman has achieved some success so far in the redressing of grievances and the improvement of administrative practice. Many of the complaints that reach the Ombudsman's office could not be actioned in the courts with positive results. It can be said that the Thai Office has yielded some of the results that were envisaged when it was originally established in Thailand, just as the model of the other ombudsman has achieved in other countries - that is to ensure that individuals have effective access to administrative justice.

According to the Ombudsman's statistics, the Ombudsman has already dealt with a considerable number of cases. Of those where an investigation was concluded, positive outcomes have been reached in a significant number. The number of complaints turned down or rejected without even investigation complaints compares very favourably with that of several other ombudsman schemes. Also statistics reveal that there seems to be a stable flow of complaints against the government from the public since 2004. Logically it might be claimed that the Ombudsman has proved to be effective in the independent investigation of maladministration; otherwise it would not be able to sustain and attract a stable flow of complaints.

The Ombudsman's activities show that it is able to negotiate with public authorities on behalf of citizens to secure redress where a serious injustice seems to have occurred but the law does not provide any redress. In order to mediate effectively, the Ombudsman has adopted techniques such as tripartite meetings and onsite visits which enhance both the Office's accessibility and public awareness of its existence and roles. Evidence suggests also that the Ombudsman Office has been successfully employing early settlement strategies, such as mediation and conciliation, to resolve complaints in a less costly and time consuming manner.

The Ombudsman also has a claim to operate as the first port of call for many citizens when faced by maladministration in government. The Ombudsman Office records high amounts of telephone enquiries, of which a large proportion has been redirected. This assistance and advice function though cannot replace a more formal

legal aid scheme but it does represent a practical solution for dealing with the problems of access to justice. The office's work fills to some extent the gap in administrative justice in Thailand by lowering the threshold to justice when compared to the courts and by resolving injustice that is not sufficiently addressed by judicial review. The output of the office, therefore, appears to fit appropriately into a wider system of constitutional coverage of citizens' rights.

In term of systemic reform, the Ombudsman has also conducted direct investigations of its own volition and produced several reports that reveal systemic weaknesses and deficiencies in administrative practice. Following this form of work, there is evidence that the Ombudsman has been responsible for a number of positive changes in administrative regulation and procedure. In particular, the Thai Ombudsman has been able to identify a lack of inter-departmental coordination and related problems of compartmental mentality.

The above findings suggest that the Ombudsman could measure up to its objectives and meet the ombudsman standard practice to a certain extent. However, there are shortcomings in the Ombudsman's operation which should be addressed in order that the Ombudsman can contribute better, both in the area of complaint handling and systemic investigation (Chapter 9). These shortcomings include a high backlog of cases which undermine the Ombudsman's effectiveness. Another issue is the fact that the Ombudsman does not provide adequate classification of the caseload relating to grievances resulting from injustice, as opposed to issues to do with legality in cases where the complainant does not have a strict legal entitlement or because of the lack of availability of an alternative redress route. The problem that arises from this lack of statistical evidence is that the Ombudsman's distinctive value when compared to other forms of redress, in particular judicial review, is not demonstrated and therefore not appreciated due to shortcomings in its operation. Further the Office does not have a process in place to follow up on the implementation of recommendations, which results in a lack of concrete indicators to advance as a useful measure of how an ombudsman is doing. This may explain why the Constitution Drafting Committee took a view that the Ombudsman's performance has been unsatisfactory. Another important shortcoming is the fact that the Ombudsman's special reports which aimed to have broader social implication have not been able to attract attention from parliament nor have they been implemented (Chapter 9) (a point to which will be returned below). All of these

issues mean that, although the Ombudsman has secured some successes, its impact has been more limited than perhaps it could have been.

### **10.3 The Thai Ombudsman and additional roles**

By itself, the above analysis leads to a conclusion that the Thai Ombudsman has a strong role to play in the constitution, but its operation needs improvement in certain respects. But the major finding of the thesis suggests that a more radical reconstruction of the Thai Ombudsman is required. This finding comes out of Chapters 6-9, in particular Chapter 8, and is one that suggests that too much has been expected of the Thai Ombudsman and that this burden has led to significant difficulties for the office, both in terms of performance and reputation.

The Thai Ombudsman was initially established only to handle complaints of grievances from individuals in dealing with government bodies, but has subsequently experienced a significant expansion in its mandates and powers. The end result is that the Thai Ombudsman has become a multi-function office with difficulties in performing its new functions. The unease around the office that has resulted from this expansion has led to a proposal for the abolition of the office on ground of underperformance. The suspicion is that the young Ombudsman is failing partly because it undertakes some functions for which the office is unfit.

The Thai Ombudsman was tasked with three additional functions by the 2007 constitution: initiating constitutional litigation; monitoring and evaluating the implementation of the Constitution, including the preparation of proposals for constitutional amendments; and reporting on violations of the code of ethics.

In performing constitutional litigation, there is evidence that the Ombudsman can protect the rights of the citizen by providing a link and an alternative means of gaining access to the Constitutional Court in the event of a problem with the constitutionality of provisions of laws. This role is an extension to, and complementary of, the Ombudsman's core role of protecting citizens' rights that may be adversely affected by the exercise of public power and the Ombudsman has not faced major difficulties in performing this function.

However, with regards to the other two additional functions of the office, namely monitoring and evaluating the implementation of the Constitution and reporting on violations of the code of ethics, the empirical investigations of this



thesis reveal that these functions require more staff, as well as extensive knowledge and expertise which the Ombudsman and its staff do not sufficiently possess. Arguably the Ombudsman's small office is not designed for such resource-intensive activities. Further, such additional functions cause more fundamental difficulties for the status of the office. For instance, the preparation of proposals for constitutional amendments is considered by some as requiring the Ombudsman to take an active role in promoting a particular policy position, a role akin to advocacy role which contradicts the Ombudsman's widely understood standing as an impartial referee. Therefore, to the extent that this new function requires the Ombudsman to compromise its essence, which requires the preservation of its impartiality, it is a role which is unfit for the Office.

With regards to reporting on violations of the code of ethics, this research (Chapter 7) has found that this function has proved to be very difficult for the Ombudsman to perform effectively in the Thai context. On top of confrontations with the executive, there is evidence to suggest that this function has subjected the Ombudsman to political partisan attacks which have grown as Thailand has had to deal with a deeply divided society since 2006. As a result, political leaders have tended to view the Ombudsman as a potential threat which has provoked political resistance. The fact that the Ombudsman has found no breach of the ethical code by these political actors, even though perhaps due to fact that the allegations were groundless, has raised doubt over his effectiveness in this task.

Another issue with these two additional functions is that they relate only indirectly to the rights of individual citizens. As a result, the Ombudsman has to serve subtly different purposes to those for which it was originally established. Certainly these functions have increased the Ombudsman's powers significantly, but this in turn has led to public mistrust and rendered the Ombudsman vulnerable to the attack of inappropriately overstepping their mandate. For instance, the Ombudsman's proposal to amend the 2007 Constitution was deemed an inappropriate exercise of its power by interpreting its mandate beyond the constitutional intention and perceived as usurping the power of the legislature (Chapter 7). For an unelected independent oversight mechanism, such as the Thai Ombudsman, to exceed its mandate is a serious issue. This situation is made more dangerous due to a perceived lack of sufficient accountability arrangements in place

for the office (Chapter 8). Eventually, this state of affairs could bring its legitimacy of the Thai Ombudsman under question.

Such problems are made more of a concern by the fact that this study has also found that these two functions to overlap with the jurisdiction of other independent constitutional organisations which are more suitable for this in terms of their resources and objectives. Duplication of functions without added value from the Ombudsman suggests that there is no need for the Ombudsman to perform these roles.

It is this analysis of the Thai Ombudsman's roles that provides perhaps the most significant finding of this thesis in terms of its contribution to the study of ombudsmen more generally. In Chapter 4, this thesis explored the expansion of the ombudsman model away from its traditional functions towards additional functions being expected of the institution. Although an analysis was identified that supported this expansion of the ombudsman model, the Chapter also constructed a set of explanatory criteria from existing literature to help explain why some roles might be less suitable to an ombudsman scheme and which contextual factors might also lead to an ombudsman scheme failing in delivery of certain functions. Analysis underpinned by this framework provides an insight into the problems that the Thai Ombudsman has faced in delivering its mandates beyond the traditional core roles. In doing so, Chapter 9 offers answers to the question of whether the Thai Ombudsman operates with an excessive remit and identify whether its existing collection of roles is appropriate.

In short, the empirical investigations of the Thai Ombudsman tend to confirm the explanatory criteria developed in Chapter 4 with regards to why an ombudsman might or might not be able to carry out its additional functions effectively.

#### **10.4 The Thai Ombudsman's institutional design**

The review of the Ombudsman's institutional features conducted in this thesis (Chapter 8) reveals that the Ombudsman is largely well-equipped to deliver his primary constitutional role. The Thai Ombudsman has a prestigious constitutional position. In fact, problems facing ombudsman schemes around the world are that they are prone to abolition and that they are perceived as not able to work as effectively in less democratic environments. Being enshrined in the Constitution

helps strengthen the existence of the Thai Ombudsman, as was apparent in the Ombudsman's ability to survive several political attempts by leading political parties to get rid of the institution over the past thirteen years.

However, structural deficiencies around the selection process for the Ombudsman, provisions which are intended to set him above party politics, have had an unintended effect of tarnishing the perception of stakeholders and the general public in terms of the Ombudsman's impartiality. Another structural shortcoming is the process to remove the Ombudsman by the Senate which also has damaged the Ombudsman's accountability.

## **10.5 Recommendations**

The following recommendations flow from the data analysis in this study. In order to increase its value and demonstrate its distinctive contribution, the following performance weakness should be addressed by the Ombudsman:

- the backlog of cases;
- the lack of formal follow up procedure after recommendations;
- insufficient statistical reports;
- unimplemented special reports.

The earlier chapters raised various solutions and measures by which these issues could be tackled. The study also points to the need to reform the Ombudsman's institutional design and to refocus on its core roles in order to increase the credibility of the institution and attract more support from parliament. The legislative framework of the Ombudsman could be amended with the following considerations:

- the relocation of the Ombudsman within the parliamentary sphere;
- setting up a designated standing special committee for scrutiny and support for the Ombudsman;
- increasing the numbers of the committee members responsible for the appointment of the Ombudsman, and including MPs on the members of the selection committee to improve the perception of impartiality and accountability;

- remove altogether functions with regards to investigation and report on ethical misconduct; and constitutional checks on the constitutional implementation;
- retaining the function of referring cases to the Constitutional Court for constitutionality review.

## 10.6 Conclusion

Having examined critically the functions and the institutional design of the Thai Ombudsman, this study contends that the Thai Ombudsman is an institution under stress. The main reason is that significantly it has been given functions that it is unable to perform adequately and effectively. The Ombudsman's institutional design also needs to be firmed up to ensure that it matches best practice in terms of impartiality and accountability. Importantly, the study identifies some operational shortcomings in the performing of its dual core functions of redressing administrative grievances and improving administration, which need to be ironed out in order for the Thai Ombudsman to be more effective. However, this study contends that, despite these weakness and shortcomings, the Ombudsman has served its main constitutional objectives in redressing administrative grievances and improving administration well. Most of its institutional features meet the standard practice of the ombudsman, which means that the foundations are there for a strong traditional ombudsman scheme. This could be considered another achievement given the fact that that many ombudsman schemes have taken some years to settle down into a strong institution. In addition, around the world, several ombudsman offices have experienced a reduction of budget and threats of abolition. The Thai Ombudsman has not only survived abolition and never suffered budget cuts, but it has also experienced a period of strengthening and being entrusted with more mandate and powers. Therefore, it is contended here that the Thai Ombudsman has done a good job and can continue to do so, but its limitations and weakness as identified above must be resolved, its institutional design and roles must be reformed.

While Thailand shares common features of newly democratizing nations in Asia such as regular military coups and chronic political instability, the country has basic component of democracy such as a large, educated middle class, a relatively robust civil society and has in recent years been one of the best-performing

economies in the world. The country devised an elaborated constitutional separation of powers and mechanisms of checks and balances, such as the new watchdogs Constitutional Court, Administrative Court and independent commissions on elections and anticorruption, and the Ombudsman, representing one the codification of one of the world's most advanced constitutions. The country also provides complex administrative justice system which includes overlapping layers of dispute resolution processes. The thesis and the study therefore can benefit in particular Asian countries with similar context like Thailand and add to our understanding of the ombudsman in general.

The Thai Ombudsman provides further evidence for the need for an ombudsman institution and of the integrity branch in operation. The Ombudsman's expansion and constitutional status in Thailand is one that exemplifies the recent trend in constitutional arrangements which makes an explicit recognition of a separate branch of government - an integrity branch of the constitution with a distinct functional specialisation alongside the traditional branches. This is an interpretation of the constitution arguably required in all government structures, alongside arguments for good administration and a broader conception of the rule of law. Perhaps a broader lesson which may be drawn is that, while an ombudsman institution may be tasked with more functions other than its traditional core administrative justice role due to its flexibility, the expansion of functions for the office is not without limit. While this study could not explicitly answer what an ombudsman should do or should not do, as this depends on a number of factors, it has provided an account of the factors that need to be considered in deciding whether or not a new function is appropriate. This is an area of ombudsmandry about which much remains to be understood. The contribution of this thesis is to demonstrate that there are some functions that are difficult for an ombudsman to perform effectively, and there is a danger in asking an ombudsman to do too much. This study supports the main stream in ombudsman literature that, while an ombudsman is an office that has the potential to meet different demands to those of its original establishment and there is no one correct ombudsman model, an ombudsman that is trying to do too much or trying to perform functions that compromise its core principles or essential features is likely to fail. This study adds to the current understanding of the institutional type and the conditions under which it could function best.

Currently, much of the standard guidance on the ombudsman seems to presume that adequate institutional design guarantees the effective operation of an ombudsman, but this thesis has highlighted that in fact there are other factors that affect the effectiveness of the ombudsman. A strong robust institutional design may not reflect the concrete performance. This paper has made a preliminary assessment of the Thai Ombudsman. On the basis of these findings, future research possibilities in this area could be the evaluation of the 'public awareness' of the Ombudsman. This is one essential feature of institutional design that could not have been fully measured through documentary analysis or the Ombudsman's actions. Further work could also be undertaken to review the effectiveness of the relationships and coordination between the Ombudsman and other independent organisations. Each of these questions demands further empirical research.

### **10.7 Current developments**

This section is added to the thesis at the time the author just finished writing and the submission date is drawing near. One of the current developments in relation to the Thai Ombudsman which deserves attention is the ongoing debates within the constitution drafting process regarding whether or not another of the Constitution's independent watchdogs, the National Human Rights Commission of Thailand (NHRC), should be retained or merged with the Office of the Ombudsman.

Bowornsak Uwanno, Head of the Constitutional Drafting Committee (CDC), announced in February 2015 that the constitutional drafters had agreed to merge the NHRC and the Office of the Ombudsman into one organisation.<sup>1</sup> The new name of the merged agencies will be the Office of the Ombudsman and Human Rights Protection. According to Bowornsak, the NHRC and the Ombudsman have similar functions so they should be merged to enable people to file complaints, while reducing operational costs. This plan has received a mixed public response and spurred wide debates which are mainly concern with how the changes will affect human rights protection in Thailand. The author, however, would like to draw attention to the impact of the proposed changes on the Ombudsman institution.

While there are a number of obvious benefits to a merger, which have been highlighted by the Head of the CDC, there are other issues that should be taken into

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<sup>1</sup> 'NHRC to fight ombudsman plan - No one consulted, civic groups say', *Bangkok Post*, 5 February 2015, retrieved 23 February 2015, <http://www.bangkokpost.com/news/politics/466533/nhrc-to-fight-ombudsman>.

consideration. First, the nature of the new organisation remains unclear. The name of the merged agencies - the Office of the Ombudsman and Human Rights Protection implies that this new organisation will be a combination of the Ombudsman and NHRC, an understanding supported by Borwornsak's statement. However, this combination suggests two possible interpretations of the nature of the Office. First, it could be that the merger changes the priority of the Ombudsman from administrative justice to human rights, which is typical for a human-rights ombudsman which has an express human-rights mandate. The other possibility is that this office has dual missions of human rights and administrative justice, with equal emphasis placed on both. According to Borwornsak, it seems that the latter is more likely. In such a case, the Thai Ombudsman will be a very different institution from the human rights ombudsman model operated elsewhere and may in fact be unique in institutional design.

Another issue of concern is the resources. A multi-function ombudsman frequently faces the problem of inadequate resources. But in this case, if the Office has two equal priorities, in addition to inadequacy, there might arise the difficulty of how to allocate an adequate budget for two equally important tasks without causing undesirable feelings of competition within the organisation. Current proposals do not provide details on the process through which such internal decisions are to be made.

It should be stressed that this proposal is not a certainty, as the proposal is at a preliminary stage and will be subjected to further consideration by several bodies, such as the National Reform Council, the National Council for Peace (NCPO) and the royal endorsement which will take another year.<sup>2</sup> There are therefore opportunities for the questions and recommendation in this thesis to be taken into account during this process. The proposal does highlight the relevancy of this thesis and the importance of factoring in the considerations raised in this thesis when embarking on institutional design and redesign.

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<sup>2</sup> The Government Public Relation Department, 'Three-Phase Roadmap Emphasized by the NCPO Head', retrieved 23 February 2015, [http://thailand.prd.go.th/view\\_news.php?id=7312&a=2](http://thailand.prd.go.th/view_news.php?id=7312&a=2).

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## **Appendix 1**

### **List of Interviewees and interview questions**

Research interviews were conducted with the individuals listed below. List of questions was sent in advance to the interviewees and served as a platform for discussion of related issues.

- Chief Ombudsman Panit Nitithanprapas
- Ombudsman Professor Sriracha Charoenpanich
- Dr. Issarabhath Teerabhathisiri, Director, the Ombudsman Office
- Wasan Thepmanee, Public Relations Officer, The Thai Ombudsman Office
- President of the Senate Surachai Liengboonlertchai, a member of the 2007 Constitution Drafting Assembly (CDA), former First Vice-President of the Senate (at the time the interview with the author was taken place)
- Soonton Maneesawat, Professor of Public law and a State Councillor
- Banjerd Singkaneti, Professor of Public Law and a member of the Law Reform Commission of Thailand
- Kamol Suksomboon, Inspector-General/ Deputy Permanent Secretary to Office of the Prime Minister

#### **Questions for an interview with the Ombudsman**

Questions are divided into three groups: concept, perception and policy which cannot be obtained from the documentary evidence; operations, procedures where the information found in the documents are not clear or where there are any gaps in the documentation and relationship with other public bodies and complainants and implementation of the ombudsman's recommendation.

##### **A. Questions pertaining concept, perception and policy**

- 1) What do you consider the most important aspect of the work of the Ombudsman/your office?
- 2) The Ombudsman's function has been expanded under the current Constitution. What do you consider the core function of the Ombudsman?
- 3) How do you make your choice of priority among investigating complaints against public authorities, overseeing ethics of politician and public officials and monitoring constitutional compliance (section 244 and 245) and on what basis? (How do you prioritise the most important aspects of the work of your office/ombudsman?)
- 4) Should the ombudsman be first and foremost a processor of complaints, or should it ideally be a promoter of good administration?
- 5) Should the Ombudsman be an alternative to the court or the last resort to resolve grievances?
- 6) Does the Ombudsman play a preventive function with regard to improper actions or abuses of powers by public officials?
- 7) Should the jurisdiction of the Thai Ombudsman cover human right issues?
- 8) Does section 244 (2) of the 2007 Constitution render the Ombudsman to become a 'morality policeman' or an 'ethics compliance officer' rather than promoting best practice?
- 9) What constraint do you encounter and to what extent do you think the Ombudsman can achieve when perform role described in 8)?
- 10) Do you consider any aspect of the Ombudsman's work could overlap with other agencies such as the recently established Law Reform Commission, the National Human Rights Commission? If there is any how does the Ombudsman deal with the overlap jurisdiction?
- 11) How can the Ombudsman add value in relation to the constitutionality checking given several specialized bodies are already in place to specifically work on this issue?
- 12) Do you consider the current mandate assigned by the Constitution too ambitious?
- 13) Do you consider the present role of the Ombudsman sufficient in achieving the intention of the Constitution?
- 14) What should the appropriate role of the Ombudsman in Thailand?
- 15) Which of the Ombudsman's roles or the function and power could/should be changed?

- 16) In which direction is the institution of Ombudsman moving in a longer term?
- 17) What do you consider to be the biggest weakness in the design of your office?
- 18) What is, in your opinion, the real challenge to Ombudsman's role?

B. Clarifying operations, procedures and relationship with other public bodies and complainants

- 19) What are the internal procedures for sieving the case?
- 20) How do you know whether or not pursuit of early settlements reduces the level of redress/justice obtained?
- 21) Are settlement followed up or do you rely on a further complaints?
- 22) Have you encountered an overlapped of jurisdiction with other constitutional independent agencies especially the Human Rights Commission and National Counter Corruption Commission? If yes how was the situation resolved?
- 23) Is there any form of cooperation between the Ombudsman and other constitutional independent agencies and in what areas?
- 24) In practice does the Ombudsman make use of his power to summon people?
- 25) How cooperative are the public bodies when the Ombudsman request information?
- 26) Has the Ombudsman participated in the parliamentary debate concerning his reports?
- 27) In practice, when referring the case to the Administrative Court regarding administrative actions, does the Ombudsman act as the prosecutor or the joint plaintiff or on behalf of the injured person?
- 28) Are you happy with the court's approach to the work of the ombudsmen (also with reference to the recent Administrative Court's ruling on 3G that the National Broadcasting and Telecommunications Commission (NBTC), which held the auction for 3G licences, does not have civil servant status, and so does not fall within the Ombudsman's jurisdiction)
- 29) In practice, what is your emphasis between alleviate individual injustice and scrutinize administrative process?
- 30) In practice, are you more concerned with the problem of the quality of the administration than the legality?
- 31) What triggers full and thorough investigation report?

- 32) Is the Ombudsman well-equipped to carry out its mandate? To what extent are you constrained by considerations of caseload volume and resources?
- 33) Does the Office of the Ombudsman collect demographic data about the kind of consumers who bring complaints to the ombudsman? (age, gender, education occupational background, etc.)
- 34) Do the Ombudsman produce the Ombudsman's guide to standards of best practice to promote good administrative practice for good public bodies, if not why and is there any plan to ?
- 35) Is budget a constraint to your independence and do you have adequate resources for your task?
- 36) In your opinion how do the current practice and roles of the Ombudsman reflect the role meant by law?
- 37) How do you consider the function and roles of the Thai Ombudsman correspond with the theoretical principles of ombudsman?

#### C. Implement of recommendation

- 38) What is the rate of implementation of your recommendation?
- 39) What is the rate of rejection and agreeing to redress not as full as your initial recommendation?
- 40) What evidence do you have that indicate that the Ombudsman can improve administrative practice in general?
- 41) What is the process by which you would pursue a recommendation that had been rejected? Could this be more effective?
- 42) In your opinion, has the Ombudsman's function in policing ethical codes affected public perception of the Ombudsman's neutrality, a good working relationship with executive agencies which ultimately the adoption of the Ombudsman recommendations?
- 43) Does the Ombudsman get enough support from parliament on the implementation of recommendation?
- 44) How does parliament respond to the Ombudsman's systemic report (Special report)?
- 45) Has parliament debated on the Ombudsman's reports?



## **Questions for an interview with the Vice President of the Senate, scholars and senior government officials**

### A. Background and role of the Ombudsman

- 1) What is the source and intention of the Constitution in determining the functions of the Ombudsman under the Constitution of the Kingdom of Thailand 2550 B.E?
- 2) Would you agree or not that the main role of the Ombudsman is to ameliorate the suffering of the people from the exercise of power the officers of the state, if not, what should be the role of the Ombudsman?
- 3) Why was the ombudsman given such a diverse range of roles in the 2007 constitution? What was the problem that led to the new powers being introduced? Was any consideration given to creating a new body to perform the constitutional and ethical investigations? Were any concerns expressed as to the Ombudsman's capacity to perform these roles – or was it always felt that the ombudsman was the best institution for the task?
- 4) Which Ombudsman does the Thai Ombudsman modeled after?

### B. Detailed questions on the Ombudsman's functions

#### *Ethics*

- 5) Why is the Ombudsman an appropriate body to monitor ethical enforcement?
- 6) For the past five years have you seen any problem in the Ombudsman's role in monitoring how ethical enforcement? How far has this role become?
- 7) In your opinion does the role in examines ethical enforcement makes the Ombudsman in Parliament and the government members, if yes would this conflict affect the Ombudsman's function and capacity to redress the administrative grievances of the people?

#### *Constitutional Review*

- 8) The Constitution empowers the Ombudsman to monitor the implementation of the Constitution and proposed for constitutional amendments. What is the intent of the Constitution: to have the Ombudsman to rectify the practical problem encountered in the constitutional implementation by state mechanisms, or to play a role in

determining? How the constitutional structure and mechanisms and the exercise of state powers should be?

- 9) Is it appropriate for the Ombudsman to be a mechanism for referring laws and acts of public officials to the Constitutional Court with queries on constitutionality?
- 10) Do you consider any aspect of the Ombudsman's work could overlap with other agencies such as the recently established Law Reform Commission, the National Human Rights Commission?
- 11) How can the Ombudsman add value in relation to the constitutionality checking given several specialized bodies are already in place to specifically work on this issue?

#### *Promoting good administration and complaints handling*

- 12) In your opinion as a member of the Senate, has the Ombudsman played a significant role to improve the functioning of the administration?
- 13) What should be the focus of the Ombudsman: easing the individual grievances on case by case basis or proposing recommendation to rectify the shortcomings in the functioning of the administrative system?

#### *Accountability issues*

- 14) How has the attention of parliament to the Office of the Ombudsman been? How have the Ombudsman's annual reports been considered?
- 15) How has the support of parliament to the Office of the Ombudsman been? Is there any response to the Ombudsman's Special Report, have they been considered by parliament?
- 16) Are you involved in the process of appointment of the ombudsman in any way? Do you have any concerns about the ability of the ombudsman to operate independently?
- 17) Would your committee be involved in the dismissal of an ombudsman, if that was ever necessary?
- 18) Do you think the ombudsman is sufficiently accountable for its performance?

### C. Opinions on current performance

- 19) In your capacity as a member of the Senate a mechanism that controls and monitors the work of the Ombudsman, has the current role of the Ombudsman been able to fulfill the spirit of the Constitution?
- 20) Constitution requires that the Ombudsman has several important functions, as mentioned in the question above. Should the Ombudsman prioritize these functions?
- 21) In order to achieve the intent of the Constitution, should the Ombudsman's mandate be changed or amended?
- 22) Is the powers and duties under the Constitution and the role of the Ombudsman is appropriate to the current conditions of the country and should there be any adjustment?
- 23) Do you consider the current mandate assigned by the Constitution too ambitious?
- 24) Which of the Ombudsman's roles or the function and power could/should be changed?
- 25) In which direction is the institution of Ombudsman moving in a longer term?
- 26) What do you consider to be the biggest weakness in the design of your office?
- 27) What is, in your opinion, the real challenge to Ombudsman's role?

## APPENDIX 2

### CONSTITUTION OF THE KINGDOM OF THAILAND, B.E. 2550 (2007)

#### 2. The Ombudsmen

**Section 242.** There shall be three Ombudsmen who shall be appointed by the King with the advice of the Senate from the persons recognised and respected by the public, with knowledge and experience in the administration of State affairs, enterprises or activities of common interests of the public and with apparent integrity.

The elected persons to be Ombudsmen shall hold a meeting and elect one among themselves to be the President of the Ombudsmen and notify the result to the President of the Senate accordingly.

The President of the Senate shall countersign the Royal Command appointing the Ombudsmen.

The qualifications and prohibitions of the Ombudsmen shall be in accordance with the organic law on Ombudsmen.

The Ombudsmen shall hold office for a term of six years as from the date of their appointment by the King and shall serve for only one term.

There shall be the Office of the Ombudsmen being an agency having autonomy in its personnel administration, budget and other activities as provided by law.

**Section 243.** The provisions of section 206<sup>1</sup> and 207<sup>2</sup> shall apply mutatis mutandis to the selection and election of the Ombudsmen. In such case, there shall be a Selective

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<sup>1</sup> Section 206. The selection and election of judges of the Constitutional Court under section 204 (3) and (4) shall be proceeded as follows:

(1) there shall be a Selective Committee for Judges of the Constitutional Court consisting of the President of the Supreme Court of Justice, the President of the Supreme Administrative Court, the President of the House of Representatives, the Leader of the Opposition in the House of Representatives and the President of the Constitutional independent organisations whom elected among themselves to be one in number, as members. The Selective Committee must complete the selection under section 204 (3) and (4) within thirty days as from the date a ground for the selection occurs and then nominates the selected persons, with their consents, to the President of the Senate. The selection resolution shall be by open votes and passed by the votes of not less than two-thirds of

Committee of seven members consisting of the President of the Supreme Court of Justice, the President of the Constitutional Court, the President of the Supreme Administrative Court, the President of the House of Representatives, the Leader of the Opposition in the House of Representatives, a person selected at a general meeting of the Supreme Court of Justice and a person selected at a general meeting of the Supreme Administrative Court and the provisions of section 231 (1) paragraph two shall apply *mutatis mutandis*.

**Section 244.** The Ombudsmen have the powers and duties as follows:

(1) to consider and inquire into the complaint for fact-findings in the following cases:

(a) failure to perform in compliance with the law or performance beyond powers and duties as provided by law of a government official, an official or employee of a government agency, State agency, State enterprise or local government organisation;

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the total number of the existing members of the Selective Committee. In the case where there is no member in any position or a member is unable to perform his duty and the number of the remaining members is not less than one-half thereof, the Selective Committee shall consist of the remaining members; provided that the provisions of section 113 paragraph two shall apply *mutatis mutandis*;

(2) the President of the Senate shall convoke a sitting of the Senate for the passing of approval resolution to the selected persons under (1) within thirty days as from the date of receipt of the nomination. A resolution shall be made by secret ballot. In case of approval resolution, the President of the Senate shall tender the nominated persons to the King for His appointment. In the case where the Senate disapproves the nomination, whether wholly or partly, it shall be returned to the Selective Committee for reselection. In such case, if the Selective Committee disagrees with the Senate and reaffirms its resolution unanimously, the names of the selected person shall be nominated to the President of the Senate to present to the King for His appointment, but if the reaffirmation is not passed by unanimous resolution, the reselection shall be commenced and it shall complete within thirty days as from the date a ground for the selection occurs.

If it is unable to complete the selection under (1) within the specified period by any cause, the Supreme Court of Justice shall, at its general meeting, appoint three judges of the Supreme Court of Justice holding a position of not lower than a judge of the Supreme Court of Justice and the Supreme Administrative Court shall, at its general meeting, appoint two judges of the Supreme Administrative Court to be members of the Selective Committee for the carrying out the duty under (1).

<sup>2</sup> Section 207. The President and judges of the Constitutional Court shall not:

(1) be a government official holding a permanent position or receiving a salary;

(2) be an official or employee of a State agency, State enterprise or local government organisation or a director or adviser of a State enterprise or State agency;

(3) hold any position in a partnership, a company or an organisation carrying out business with a view to sharing profits or incomes, or be an employee of any person;

(4) engage in any independent profession.

In the case where the general meeting of the Supreme Court of Justice or of the Supreme Administrative Court or the Senate, has approved the person in (1), (2), (3) or (4) with the consent of that person, the selected person can commence the performance of duty only when he has resigned from the position in (1), (2) or (3) or has satisfied that his engagement in such independent profession has ceased to exist. This must be done within fifteen days as from the date of the selection or approval. If such person has not resigned or has not ceased to engage in the independent profession within the specified period, it shall be deemed that that person has never been selected or approved to be a judge of the Constitutional Court and the provisions of section 204 and section 206, as the case may be, shall apply

(b) performance of or omission to perform duties of a government official, an official or employee of a government agency, State agency, State enterprise or local government organisation, which unjustly causes injuries to the complainant or the public whether such act is lawful or not;

(c) investigation any omission to perform duties or unlawful performance of duties of the Constitutional organisation or agencies in the administration of justice, except the trial and adjudication of the Courts;

(d) other cases as provided by law;

(2) to conduct the proceeding in relation to ethics of persons holding political positions and State officials under section 279 paragraph three<sup>3</sup> and section 280<sup>4</sup>;

(3) to monitor, evaluate and prepare recommendations on the compliance with the Constitution including considerations for amendment of the Constitution as deemed necessary;

(4) to report the result of its investigation and performance together with comments to the Council of Ministers, the House of Representatives and the Senate annually. Such report shall be published in the Government Gazette and disclosed to the public.

In exercising of powers and duties under (1) (a), (b) and (c), the Ombudsmen shall proceed where there is a complaint thereon, provided that the Ombudsmen is of the opinion that such act causes injuries to the public or it is necessary to protect public interests and, in such case, the Ombudsmen may consider and conduct investigation irrespective of a complaint.

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<sup>3</sup> Section 273 para 3. Any violation or failure to comply with ethical standard under paragraph one is deemed to be in breach of discipline. In the case where a person holding political position violates or fails to comply therewith, the Ombudsmen shall report to the National Assembly, the Council of Ministers or related local assemblies, as the case may be, and shall refer the matter, in case of serious violation or failure, to the National Counter Corruption Commission for further proceedings and it is deemed the cause for removal from office under section 270.

<sup>4</sup> Section 280. For the purpose of this Chapter, the Ombudsmen have the powers and duties in giving suggestion or recommendation in the making of or improving the Code of Ethics under section 279 paragraph one and enhances ethical consciousness of persons holding political positions, government officials and State officials, and have duties to report any violation of the Code of Ethics to the responsible person for the enforcement of the Code under section 279 paragraph three.

In the case where the violation or failure to comply with the ethical standard is made in a serious manner or there is a reasonable ground to believe that the responsible may act unfairly, the Ombudsmen may conduct inquisition and disclose the result thereof to the public.

**Section 245.** The Ombudsmen may submit a case to the Constitutional Court or Administrative Court in the following cases:

(1) if the provisions of any law begs the question of the constitutionality, the Ombudsmen shall submit the case and the opinion to the Constitutional Court and the Constitutional Court shall decide without delay in accordance with the organic law on rules and procedure of the Constitutional Court;

(2) if rules, orders or actions of any person under section 244 (1) (a) begs the question of the constitutionality or legality, the Ombudsmen shall submit the case and the opinion to the Administrative Court and the Administrative Court shall decide without delay in accordance with the Act on Establishment of the Administrative Courts and Administrative Courts Procedure.

## **Appendix 3**

### **The Organic Act on Ombudsmen 2552 B.E. (2009)**



**ORGANIC ACT ON OMBUDSMEN,  
B.E. 2552 (2009)**

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BHUMIBOL ADULYADEJ, REX.  
Given on the 10<sup>th</sup> Day of July B.E. 2552;  
Being the 64<sup>th</sup> Year of the Present Reign.

His Majesty King Bhumibol Adulyadej is graciously pleased to proclaim that:  
Whereas it is expedient to have an Organic Act on Ombudsmen;

This Act contains certain provisions in relation to the restriction of right and liberty of person, in respect of which section 29 in conjunction with section 31, section 33, section 35, section 36, section 45, section 56, section 59 and section 62 of the Constitution of the Kingdom of Thailand so permit by virtue of law;

Be it, therefore, enacted by the King, by and with the advice and consent of the National Assembly, as follows:

**Section 1.** This Organic Act is called the “Organic Act on Ombudsmen, B.E. 2552”.

**Section 2.** This Organic Act shall come into force as from the day following the date of its publication in the Government Gazette. <sup>1</sup>

**Section 3.** The followings shall be repealed:

(1) Organic Act on Parliamentary Ombudsmen, B.E. 2542;  
(2) Announcement of the Council for Democratic Reform under Constitutional Monarchy No. 14, dated 21<sup>st</sup> September B.E. 2549.

**Section 4.** In this Organic Act:

"Government agency" means Ministry, Sub-Ministry, Department or government agency named otherwise but having equal status to Ministry, Sub-Ministry or Department;

"State agency" means any agency other than government agency, State enterprise or local government organisation;

"State enterprise" means State enterprise under the law on budgetary procedure;

"Local government organisation" means local government organisation under the law on State administration;

"Person holding political position" means a person holding political position under the law on counter corruption;

"State official" means a government official, official, employee or a person working for a government agency, State agency, State enterprise or local government organisation and a competent official under the law on regional administration;

"Officer" means an official, employee or a person appointed by the

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<sup>1</sup> Published in the Government Gazette Vol.126, Part 50 *Kor*, dated 4<sup>th</sup> August B.E.2552(2009).

Ombudsmen to perform any duty under this Organic Act.

**Section 5.** The President of the Ombudsmen shall have charge and control of the execution of this Organic Act and shall, with collective approval of the Ombudsmen, have the power to issue Regulation or Notification for the execution of this Organic Act.

Such Regulation or Notification shall come into force upon its publication in the Government Gazette.

## **CHAPTER I**

### **Ombudsman**

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**Section 6.** The Ombudsmen under this Organic Act shall have its composition, selection, election, approval and term of office as prescribed by the Constitution. The Secretariat of the Senate shall be secretariat unit for the execution under paragraph one.

**Section 7.** The Ombudsman shall be a person recognised and respected by the public, with knowledge and experience in the administration of State affairs, enterprises or other activities of common interests of the public and with apparent integrity.

**Section 8.** The Ombudsman shall have qualifications and shall not be under any of the prohibitions as follows:

- (1) being of Thai nationality by birth;
- (2) being of not less than forty five years of age on the application date;
- (3) having graduated with not lower than a Bachelor degree or its equivalent;
- (4) not having been the Ombudsman or Parliamentary Ombudsman;
- (5) not being a disfranchised person;
- (6) not being a member of the House of Representatives, member of the Senate, Political official, local administrator or member of local assembly;
- (7) not being or having been a member of political party or person holding any other position of political party within three years prior to the application date;
- (8) not being a judge of the Constitutional Court, judge of the Administrative Court, Election commissioner, National Counter Corruption Commissioner, State Audit Commissioner or National Human Rights Commissioner;
- (9) not being bankrupt or dishonest bankrupt;
- (10) not having been sentenced by a judgment to a term of imprisonment irrespective of whether the case becomes final or the sentence has been suspended, except for an offence committed through negligence, a petty offence or defamation and such case has not become final or the sentence has been suspended;
- (11) not having been expelled, dismissed or removed from official agency, State agency, State enterprise or local government organization on the ground of serious violation of discipline;

(12) not having been vacated from office of a member of the House of Representatives or member of the Senate upon any decision or resolution under the Constitution;

(13) not having been removed from office under the Constitution; (14) not being a narcotics addict;

(15) not having been ordered by a judgment or an order of the Court that his assets shall vest in the State on the ground of unusual wealth or an unusual increase of assets.

**Section 9.** Apart from vacating office at the end of the term, the Ombudsman vacates office upon:

- (1) death;
- (2) being seventy years of age;
- (3) resignation;
- (4) being disqualified or being under any of the prohibitions under section 8;
- (5) having been sentenced by a judgment to a term of imprisonment irrespective of whether the case becomes final or the sentence has been suspended, except for an offence committed through negligence, a petty offence or defamation and such case has not become final or the sentence has been suspended;
- (6) having been ordered by a judgment or an order of the Court that his assets shall vest in the State on the ground of unusual wealth or an unusual increase of assets;
- (7) being under any of the prohibitions under section 207 (1), (2), (3) and (4) of the Constitution;
- (8) being removed from office by the resolution of the Senate.

**Section 10.** In the case where the President of the Ombudsmen or the Ombudsman vacates office, the selection and election therefore shall be completed in accordance with the provisions of the Constitution.

The President of the Ombudsmen or the Ombudsman who vacates office at the end of the term shall remain in office to continue his duties until the new President of the Ombudsmen or Ombudsman has been appointed.

**Section 11.** In the case where the Ombudsman vacates office before term, the existing Ombudsmen shall continue their duties.

If there are two Ombudsmen left, the senior Ombudsman shall be Acting President of the Ombudsmen until the new President of the Ombudsmen has been appointed.

**Section 12.** In the performance of duties of the Ombudsmen, the President of the Ombudsmen and the Ombudsmen shall jointly meet to divide their responsibilities with a view to enable each Ombudsman to perform his duties independently and to be accountable for his entrusted responsibilities in accordance with the rule and procedure as jointly determined by the President of the Ombudsmen and the Ombudsmen, except the case under paragraph three.

At the meeting under paragraph one, the President of the Ombudsmen shall preside over the meeting. If the President of the Ombudsmen is unable to present at the meeting, the senior Ombudsman shall preside over the meeting.

In the performance of duties of the Ombudsmen under section 14, section 15 (5), (6), (7) and (8), section 24 paragraph three, section 25 paragraph two, section 32 paragraph two, section 33 paragraph two and paragraph three, section 37 paragraph two, section 39, section 41, section 42 and section 43 or under other laws, the Ombudsmen shall jointly meet and agree. If there is two Ombudsmen left, the existing Ombudsmen shall continue joint meeting and giving approval.

**Section 13.** The Ombudsmen shall have the powers and duties as follows:

(1) to consider and inquire into the complaint for fact-finding in the following cases;

(a) failure to perform in compliance with the law or performance beyond powers and duties as prescribed by law of a government official, official or employee of a government agency, State agency, State enterprise or local government organisation;

(b) performance of or commission to perform duties of a government official, official or employee of a government agency, State agency, State enterprise or local government organisation, which unjustly causes injuries to the complainant or the public whether such act is lawful or not;

(c) investigating any omission to perform duties or unlawful performance of duties of the Constitutional organisation or agency in the administration of justice, except the trial and adjudication of the Court;

(d) other cases as prescribed by law;

(2) to conduct the proceeding in relation to ethics of a person holding political position and State official under section 279 paragraph three and section 280;

(3) to monitor, evaluate and prepare recommendations on the compliance with the Constitution including consideration for amendment of the Constitution as deemed necessary;

(4) to report the result of its investigation and performance together with recommendation to the Council of Ministers, the House of Representatives and the Senate annually. Such report shall be published in the Government Gazette and disclosed to the public.

In exercising of powers and duties under (1) (a), (b) and (c), the Ombudsmen shall proceed where there is a complaint thereon, provided that the Ombudsmen is of opinion that such act causes injuries to the public or it is necessary to protect public interests and, in such case, the Ombudsmen may consider and conduct investigation irrespective of a complaint.

**Section 14.** The Ombudsmen may submit a case to the Constitutional Court or Administrative Court in the following cases:

(1) if the provisions of any law beg the question of constitutionality, the case together with its opinion thereon shall be submitted to the Constitutional Court for consideration;

(2) if any rule, order or action of any person under section 13 (1) (a) begs the question of constitutionality or legality, the case together with its opinion thereon shall be submitted to the Administrative Court for consideration.

**Section 15.** In the performance of duties under this Organic Act, the Ombudsmen shall have the powers:

(1) to request a government agency, State agency, State enterprise or local government organisation to give, in writing, statement of fact or opinion in concerning with its performance or to submit any related object, document, proof or evidence for consideration;

(2) to request the superior or officer of the agency under (1), public prosecutor, inquiry official or any person to give statement of fact in writing or orally or to submit any related object, document, proof or evidence for consideration;

(3) to request the Court to submit any related object, document, proof or evidence for consideration;

(4) to examine any place related to the complaint, but the owner or a person having possessory right thereof shall be informed in advance as necessary;

(5) to issue regulation determining rule and procedure on receiving of complaint for consideration and the regulation on inquiry;

(6) to issue regulation determining rule and procedure for the conduct of proceedings in relation to ethics of a person holding political position and State official under section 37 and section 39;

(7) to issue regulation determining rule on expenditure, allowance and travel expense of oral evidence and the performance of duty of the officer;

(8) to issue any regulation or carrying out any other duty which is prescribed by this Organic Act or other laws to be duty of the Ombudsmen.

**Section 16.** In exercising of powers of the Ombudsmen under section 15, regard shall be had to its impact to security of State, public safety or international relation.

In the case where the Ombudsmen is unable to inquire into fact in any matter, such matter shall be ceased and the Ombudsmen shall report the Council of Ministers, the House of Representatives and the Senate for information without delay.

**Section 17.** The report under section 32 and section 33 shall be made in summary without any detail which may disclose confidential information of any person or agency unnecessarily.

**Section 18.** The Ombudsman shall not be liable to both civil and criminal liabilities if he exercises the powers and duties under this Organic Act in good faith.

**Section 19.** A person who gives statement or submits any object, document, proof or evidence in concerning with the matter under this Organic Act to the Ombudsmen or officer entrusted in writing by the Ombudsmen or a person preparing and disseminating the report of the Ombudsmen under section 32, section 33 and section 43 shall not be liable to civil, criminal or disciplinary if he discloses information or submits any object, document, proof or evidence or prepares or discloses the report, as the case may be, in good faith.

**Section 20.** In the performance of duties under this Organic Act, the Ombudsman and officer shall be the competent official under the Penal Code.

**Section 21.** No person shall disclose any statement, fact or information obtained from an implementation under this Organic Act, provided that he has been entrusted by the Ombudsmen or it is the performance on his official duty or it is beneficial to an examination or inquiry or it has to be reported under his powers and duties or it has to be done in accordance with the provisions of this Organic Act.

**Section 22.** Salary, position allowance and other benefits of the President of the Ombudsmen and the Ombudsman shall be in accordance with the law on such matter.

## **CHAPTER II**

### **Complaint and Inquiry**

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#### **Part 1**

#### **Complaint**

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**Section 23.** Any person, group of persons and community shall have the right to make a complaint to the Ombudsmen in accordance with the provisions of this Organic Act.

The making of complaint under this Organic Act shall not prejudice to the rights of the complainant under other laws.

**Section 24.** A complaint may be made to the Ombudsmen in writing, orally or by other means.

In case of a written complaint, it shall have at least the following compositions:

- (1) name and address of the complainant;
- (2) cause of complaint together with statement of fact or circumstance in relation to the matter under complaint;
- (3) polite language;
- (4) signature of the complainant.

The rule and procedure for the making of oral and other complaints shall be in accordance with the regulation as prescribed by the President of the Ombudsmen.

**Section 25.** The complainant may submit the complaint to the Ombudsmen via the Office of the Ombudsmen in person, by post, by hand or by other means.

The rule and procedure on submission of complaint by other means under paragraph one shall be in accordance with the regulation as prescribed by the President of the Ombudsmen.

**Section 26.** In the case where the Committee of the House of Representatives or the Senate conducts inquiry or consideration on any matter and it is of opinion that such matter is subjected to the powers and duties of the Ombudsmen under this Organic Act, such Committee may submit that matter to the Ombudsmen for consideration and the Ombudsmen shall submit its preliminary report on the result thereof to such Committee.

**Section 27.** After having received the matter from the Committee under section 26, the Ombudsmen shall have the power to continue its consideration on that matter despite such Committee vacates office en masse.

## Part 2 Inquiry

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**Section 28.** The complaint decided by the Ombudsmen of having the following characteristics shall be rejected or ceased:

- (1) being policy of the Council of Ministers as stated to the National Assembly, except where the implementation in accordance with such policy being the matter under section 13 (1) or (2);
- (2) being the matter that having been filed to the Court or the matter that the Court has final judgment or order thereon;
- (3) not being the matters under section 13 (1) and (2);
- (4) being the matter relating to personnel administration or disciplinary action of government official, official or employee of a government agency, State agency, State enterprise or local government organisation, except the matter under section 13 (2);
- (5) the complainant fails to comply with section 24.

**Section 29.** The Ombudsmen may reject or cease the complaint related to:

- (1) corruption in official service;
- (2) the matter in which the complainant is not an interested person and the consideration thereon is not beneficial to the public;
- (3) the matter submitted after the lapse of two years as from the date the complainant knows or ought to know the cause of the complaint and the consideration thereon is not beneficial to the public;
- (4) the matter in which the appropriate remedy or compensation for grief or unfairness of the complainant has been given and the consideration thereon is not beneficial to the public;
- (5) the matter in which the complainant fails to give oral statement or present evidence or fails to do any act as requested writing by the Ombudsmen within specified period and without reasonable grounds;
- (6) the matter in which the complainant has deceased without heir to continue the complaint and the consideration thereon is not beneficial to the public;
- (7) the matter in which the Ombudsmen has had conclusion, except where the new evidence or fact has been found and the consideration result may be changed on account thereof.

**Section 30.** In case of the complaint that is having been rejected under section 28 and the complaint that may be rejected under section 29, the Ombudsmen may submit such complaint to related government agency, State agency, State enterprise or local government organisation for their appropriate proceedings.

**Section 31.** The Ombudsmen shall, upon the complaint under this Organic Act, finish its consideration without delay and shall enable the complainant, government official, official or employee of related government agency, State agency, State enterprise or local government organisation to give statement and present evidence in relation to their statement as appropriate.

An order of the Ombudsmen rejecting or ceasing any complaint together with supporting reason thereof shall be informed to the complainant and may, for the performance of official service, be sent to related agency for its information.

The supporting reason under paragraph two shall clarify in details of fact and related law. In case of an order ceasing consideration of a complaint on the ground that an act of the government official, official or employee of the government agency, State agency, State enterprise or local government organisation is not subjected to section 13 (1) (a) (b) or ( c) or section 13 (2), the detailed reason why such act is lawful and fair shall also be clarified to the complainant.

**Section 32.** At the completion of consideration and inquiry on any complaint, the Ombudsmen shall prepare and submit the report summarising the fact together with its giving opinion and recommendation for the revision thereof to the related government agency, State agency, State enterprise or local government organisation for information or implementation.

In the case where the Ombudsmen is of opinion that despite an act of a government official, official or employee of a government agency, State agency, State enterprise or local government organisation is compliant with the law, by-law, rule, regulation or resolution of the Council of Ministers, but such the law, by-law, rule, regulation or resolution of the Council of Ministers induces unfairness or inequality before the law or being the ground of discrimination or out of date, the Ombudsmen shall recommend related government agency, State agency, State enterprise or local government organisation to cause revision or amendment to such law, by-law, rule, regulation or resolution of the Council of Ministers. If the recommendation relates to the resolution of the Council of Ministers, the report shall also be submitted to the Council of Ministers for information.

In the case where the Ombudsmen recommends the agency under paragraph two to revise or amend the law, by-law, rule and regulation, if such agency fails to proceed with that recommendation within a reasonable period, the Ombudsmen shall inform the law reform organisation under the Constitution for further proceedings and shall urgently report that matter to the Council of Ministers, the House of Representatives and the Senate for information.

**Section 33.** In the case where a government official, official or employee of a government agency, State agency, State enterprise or local government organisation fails to comply with the opinion or recommendation of the Ombudsmen on any matter within a reasonable period, the Ombudsmen shall inform the Prime Minister, Minister or the person controlling or supervising such government agency, State agency, State enterprise or local government organisation so as to have necessary order thereon and to report their implementation to the Ombudsmen forthwith.



After having conducted the proceedings under paragraph one for a reasonable period but the government official, official or employee of the government agency, State agency, State enterprise or local government organisation fails to comply with such opinion or recommendation without reasonable ground and that matter is important or relating to public interest or the public at large, the Ombudsmen shall urgently submit the report on such matter to the Council of Ministers, the House of Representatives and the Senate.

Such report shall be disclosed to the public in accordance with the procedure as determined by the President of the Ombudsmen.

**Section 34.** In any matter, if the Ombudsmen is of opinion that there is a reasonable ground to suspect of corruption in official service or there is a criminal or disciplinary well-grounded, the Ombudsmen shall inform the agency having the power to investigate such matter and the superior of a government official, official or employee of related government agency, State agency, State enterprise or local government organisation for information and further legal proceedings.

The agency having the power to investigate the matter and the superior under paragraph one shall report their implementation to the Ombudsmen every three months.

### **CHAPTER III**

#### **Inquiry for Constitutional Organs and Judicial Process Organs**

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**Section 35.** If the constitutional organs and judicial process organs omit their duties or perform their duties illegally under section 13 (1) (c), the provisions of Chapter II Complaint and Inquiry shall apply *mutatis mutandis*.

### **CHAPTER IV**

#### **Ethics of a Person Holding Political Position and State Official**

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**Section 36.** In conducting the proceedings in relation to ethics of a person holding political position and State official, the Ombudsmen shall have the powers and duties as follows:

(1) to give advice or recommendation for the making of ethical standard or improving the code of ethics of each kind of persons holding political positions and State officials;

(2) to enhance ethical consciousness of a person holding political position and State official;

(3) to report any conduct which is in violation of the code of ethics so as to make the person responsible for the enforcement of the code of ethics to make enforcement thereof.

For the execution of this Chapter, a government agency, State agency, State enterprise and local government organisation shall submitted their established code of ethics to the Office of the Ombudsmen within sixty days as from the establishment date thereof.

**Section 37.** If there is a complaint that a person holding political position violates or fails to comply with the ethical standard under the code of ethics, the Ombudsmen shall consider and inquire into fact. In this regard, the provisions of Chapter II Complaint and Inquiry shall apply *mutatis mutandis*.

If it appears, upon the completion of consideration and inquiry under paragraph one, that a person holding political position violates or fails to comply with the ethical standard under the code of ethics, the Ombudsmen shall report the National Assembly, Council of Ministers or related local assembly, as the case may be, so as to make enforcement of the code of ethics. If such conduct is serious offense, the Ombudsmen shall submit such matter to the National Counter Corruption Commission for consideration. In this case, such conduct is deemed to be a cause for removal from office under the Constitution.

**Section 38.** If there is a complaint that a State official violates or fails to comply with the ethical standard under the code of ethics, the Ombudsmen shall submit such matter to the person responsible for the enforcement of the code of ethics to make enforcement thereof.

**Section 39.** If the Ombudsmen is of opinion that any violation or failure to comply with the ethical standard is serious or there is a reasonable ground to believe that the proceedings conducted by the responsible person may be unfair, the Ombudsmen may conduct inquiry and disclose the result thereof to the public.

An inquiry and the disclosure of the result thereof to the public under paragraph one shall be in accordance with the regulation as determined by the President of the Ombudsmen which having standard or having security of not lower than the standard or security under section 31.

## CHAPTER V

### Monitor, Evaluation and Recommendation on an Implementation of the Constitution

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**Section 40.** The Ombudsmen may, in monitoring and evaluating an implementation of the Constitution, request a government agency, State agency, State enterprise or local government organisation to give statement and report on their performance for consideration.

If it appears, after monitoring and evaluating an implementation of the Constitution, to the Ombudsmen that any agency fails to comply with the Constitution in any matter, the Ombudsmen shall prepare and submit the recommendation for an implementation of the Constitution to the person who controls or supervises such government agency, State agency, State enterprise or local government organisation in order to have an order as necessary for each case and such agency shall report its performance to the Ombudsmen for information.

**Section 41.** The Ombudsmen shall conduct evaluation on an implementation of the Constitution of all government agencies, State agencies, State enterprises or local government organisations annually in accordance with the evaluation rule as determined by the President of the Ombudsmen.

The Ombudsmen shall report the evaluation result to the Council of Ministers, the House of the Representatives and the Senate for information under section 43.

**Section 42.** In conducting evaluation on an implementation of the Constitution, if the Ombudsmen is of opinion that amendment to the Constitution has to be considered, the President of the Ombudsmen shall, with collective approval of the Ombudsmen, propose the Council of Ministers, the House of the Representatives and the Senate for further proceedings as necessary.

## CHAPTER VI Annual Report

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**Section 43.** The Ombudsmen shall submit its annual report to the Council of Ministers, the House of the Representatives and the Senate within March of each year and one Ombudsman shall state the annual report to the House of Representatives and the Senate himself. Such report shall have at least the following information:

(1) results of inquiries on all matters together with the advises or recommendations given to the government agencies, State agencies, State enterprises or local government organisations;

(2) implementation of the government agencies, State agencies, State enterprises or local government organisations or State officials done or undone in response of the advises or recommendations of the Ombudsmen;

(3) failures to comply with section 15 of the government agencies, State agencies, State enterprises or local government organisations or State officials;

(4) violation of or failure to comply with ethical standard of a person holding political position and government official;

(5) results of monitoring, evaluation and recommendation on an implementation of the Constitution;

(6) hurdles in the execution of duties of the Ombudsmen.

The annual report under paragraph one shall be published in the Government Gazette and shall be disclosed to the public in accordance with the procedure as determined by the president of the Ombudsmen. In determining of this procedure, the President of the Ombudsmen shall determine the measures that may be accessed by the handicapped and old age person.

The Ombudsmen may, if it deems appropriate, make a report on any specific matter to the Council of Ministers, the House of Representatives or the Senate for information if it deems that such matter is urgent or beneficial to the administration of State's affairs.

**Section 44.** The provisions of section 17 shall apply to the making of report under section 43.

## CHAPTER VII

### Penalties

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**Section 45.** Whoever violates or fails to comply with section 15 (2) shall be liable to imprisonment for a term of not exceeding six months or to a fine of not exceeding ten thousand Baht or to both.

**Section 46.** Whoever fights with or obstructs the carrying out of duties under section 15 (4) shall be liable to imprisonment for a term of not exceeding one year or to a fine of not exceeding twenty thousand Baht or to both.

**Section 45.** Whoever fails to comply with section 21 shall be liable to imprisonment for a term of not exceeding six months or to a fine of not exceeding ten thousand Baht or to both.

### Transitory Provisions

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**Section 46.** Any act related to the complaint submitted to the Parliamentary Ombudsmen under the Organic Act on Parliamentary Ombudsmen, B.E. 2542 which has been done or has not yet completed shall be deemed to be an implementation under this Organic Act.

**Section 47.** All laws, rules, regulations, notifications or orders enacted or issued under the provisions of the Organic Act on Parliamentary Ombudsmen, B.E. 2542 shall be continued in force in so far as they are not contrary to or inconsistent with this Organic Act until the enactment or issuance of the laws, rules, regulations, notifications or orders under this Organic Act.

**Section 50.** The Ombudsmen holding office on the promulgation date of this Organic Act shall be the Ombudsmen under the provisions of this Organic Act and shall be in office until the expiration of the term of office. In this regard, the term of office shall begin on the date the appointment has been made by the King.

**Section 51.** The Office of the Parliamentary Ombudsmen under the Organic Act on Parliamentary Ombudsmen, B.E. 2542 shall be deemed as the Office of the Ombudsmen temporarily until the law on office of the ombudsmen comes into force.

Countersigned by:  
Abhisit Vejjajiva  
Prime Minister

**Remark:-** The reasons for the promulgation of this Organic Act is whereas section 138 of the Constitution of the Kingdom of Thailand requiring the issuance of the Organic Act on Ombudsmen and section 242 establishing the Ombudsmen and requiring the qualifications and prohibitions of the Ombudsmen to be in accordance with the Organic Act on Ombudsmen, it is therefore necessary to issue this Organic Act for the compliance with the provisions of the Constitution.